Supreme Court, U. S.
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80-97

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980

FRANCIS J. BURNS,
PETITIONER,

v.

JAMES LEO SULLIVAN ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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QUESTIONS PRESENTED

1. Whether a six month statute of limitations is consistent with federal policy in an action arising under 42 U.S.C. §§1983, 1985(3) claiming a denial of equal protection in the form of reverse racial discrimination by a public entity?

2. Whether a retroactive application of a six month statute of limitations in an action arising under 42 U.S.C. §§1983, 1985(3) claiming a denial of equal protection in the form of reverse racial discrimination by a public entity is equitable and consistent with the rule enunciated by this Court in Chevron Oil v. Huson, 404 U.S. 97 (1971)?

3. Whether Chapter 31 §27 of the General Laws of the Commonwealth of Massachusetts, as interpreted by the

Courts of the Commonwealth of Massachusetts, confers a property interest cognizable in conjunction with the due process clause of the 14th Amendment to the United States Constitution?

4. Whether a public entity's non-conformance with state mandated promotion procedures due to considerations of petitioner's race is consistent with the due process clause of the 14th Amendment of the United States Constitution?

5. Whether summary disposition was legally and constitutionally appropriate in petitioner's claim arising under 42 U.S.C. §§1983, 1985(3)?

PARTIES TO PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Parties to the proceedings in the United States Court of Appeals for the First Circuit include: Petitioner Francis J. Burns; Respondents James Leo Sullivan, City Manager of Cambridge, Walter J. Sullivan, Cambridge City Councilor, and David Marchand, Personnel Administrator of the Division of Civil Service of the Commonwealth of Massachusetts.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

No. .

FRANCIS J. BURNS,
Petitioner,

v.

JAMES LEO SULLIVAN, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, Francis J. Burns, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 31, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears in the appendix hereto, (23a-38a)[1] infra, is not yet reported.

The opinion of the United States District Court, which appears in the appendix hereto, (1a-22a) infra, is reported at 473 F. Supp. 626 (1979).

JURISDICTION

The judgement of the Court of Appeals for the First Circuit was entered on March 31, 1980. A timely petition for rehearing was denied on April 25, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

1. This form of citation refers to pages of the appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

United States Constitution, Amendments 7 and 14;

United States Code, Title 28, sections 1343, 2201 and 2202;

United States Code, Title 42, sections 1983 and 1985(3);

Massachusetts General Laws, Chapter 31, section 27;

Massachusetts General Laws, Chapter 151B section 5;

Massachusetts General Laws, Chapter 260, section 2A.

The above constitutional and statutory provisions appear in the appendix hereto, (44a, 55a) infra.

STATEMENT OF THE CASE

This is a suit seeking damages and injunctive and declaratory relief arising under 42 U.S.C. §§1983, 1985(3). The main thrust of petitioner's action alleges a denial of equal protection and due process of law as a result of invidious racial discrimination by a public entity. The petitioner, Francis J. Burns, a white male, has been employed as a patrolman in the Police Department of the City of Cambridge since November, 1967. Petitioner claims he was subjected to racial discrimination in his attempt to be promoted to the position of sergeant.

On October 22, 1973, a competitive examination was conducted by the Division of Civil Service of the Commonwealth of Massachusetts pursuant to the authority conferred on it by Chapter 31 of the General Laws of the Commonwealth for

promotion to the rank of sergeant in the Cambridge Police Department. Based on the results of said examination, Francis J. Burns was ranked ninth highest on the Eligible List out of one hundred and ten applicants.

Subsequent to the establishment of said list, a suit was instituted in the United States District Court for the District of Massachusetts, Kantor, et al, v. Sullivan, et al, C.A. No. 74-2662-T (D. Mass) seeking, inter alia, promotion of minority group members whose names may or may not have appeared on the eligibility list without regard to their respective grade scores, numerical rank on the list, or whether on not said plaintiffs took the eligibility exam.

During the month of June, 1975, after the establishment of the Eligible List, but prior to the start of the oral

interviews, a conference at the United States District Courthouse in Boston, Massachusetts was held relative to a possible settlement of the Kantor matter. All counsel were present, including counsel for the white patrolmen who were on the Eligible List. At this meeting, counsel for the City of Cambridge assured the counsel for certain white patrolmen that their clients would be promoted to the rank of sergeant. Only after such assurances were made by the counsel for the City of Cambridge, did counsel for certain white patrolmen allow their clients to execute the consent decree. Prior to this conference, counsel for the black patrolmen in the Kantor case had knowledge that three of his clients on the Eligible List were assured by City officials that they would be promoted to the rank of sergeant. Such promotions

would be made without consideration of position on the Eligible List or the results of the oral interviews.

On June 16, 1975, a consent decree was executed between the plaintiffs in that action and, among others, the respondent James Leo Sullivan in the instant case. Under the terms of said consent decree, the Eligible List was confirmed and approved and the respondent City Manager was ordered to submit forthwith to the defendant City Council an appropriate request to fund the cost of promoting not less than twenty-eight (28) patrolmen to the grade of sergeant from the names of the patrolmen appearing on the Eligible List. Pursuant to the consent decree, the petitioner received notice from the Director of Civil Service that he was certified as eligible for

appointment to the grade of sergeant. He then reported to the then Acting Chief-of-Police, Francis Pisani, now deceased, on or about June 26, 1975, for an interview for promotion. The interview lasted approximately five minutes. During said interview, plaintiff expressed his willingness to accept a promotion to the rank of sergeant.

On or about July 3, 1975, the petitioner received notice that he had been skipped over by twenty-two (22) individuals who had received examination scores inferior to the score he had achieved. These individuals included three black patrolmen, Calvin J. Kantor, Thomas H. Benson and Herbert H. Halliday of the Cambridge Police Department, who were plaintiffs in the Kantor case and who were in the 20th, 27th and 30th positions on the Eligible List, respectively. Petitioner,

Francis J. Burns, a white patrolman, was skipped over for promotion to the rank of sergeant during the series of promotions although he placed ninth on the Eligible List.

On or about July 9, 1975, respondent, James Leo Sullivan, acting as sole appointing authority for the City of Cambridge, filed with the Division of Civil Service for the Commonwealth of Massachusetts authorization of employment promoting twenty-eight (28) individuals to the rank of sergeant.

Under the provisions of the General Laws of Massachusetts (ter. Ed.), Chapter 31, Section 15(c)[1], the respondent

2. The provisions of §15(c) have been substantially duplicated in the present Mass. General Laws Chapter 31 §27, as amended by §11 and §45, Chapter 393 of the Acts of 1978.

City Manager and Acting Chief-of-Police Pisani, acting as the collective-appointing authority, were required, upon skipping over the petitioner and promoting individuals who scored lower on the eligibility examination, to provide a written statement of their reasons for so skipping over an applicant who placed higher on the list.

The petitioner was, in fact, skipped over twenty-two (22) times, and in each instance, the statement given pursuant to law was "better qualified". Such a conclusion is not based on fact or any reasonable, objective standard of comparison, but is arbitrary, capricious and unsupported by records of the plaintiff's performance as a patrolman and by records of the applicants who skipped over plaintiff in the promotion process.

The District Court granted summary judgement against petitioner holding that he was not entitled to bring his claim of constitutional deprivations before a jury (13a). Summary judgement was granted in spite of the fact that the District Court had evidence that:

1. The attorney for the black plaintiffs in Kantor v. Sullivan, C.A. No. 74-2662-T (D. Mass.) testified at a deposition in the case of Deluca V. Sullivan, 450 F. Supp. 736 (D. Mass. 1977) that he was party to a secret deal with the promoting authority whereby three black patrolmen would be promoted to the rank of sergeant regardless of their written and oral examination scores and to the exclusion of three white patrolmen (12a-13a).

2. The written and oral scores, taken in any mathematical combination, do not support the contention asserted in the

statement of reasons that the 22 individuals who passed over petitioner were "better qualified".[3]

In spite of the evidence before the Court, the inescapable inference that had petitioner been black he would have been promoted to the position of sergeant was ignored. The District Court also held that the petitioner had no property right to the position of sergeant (20a) and, consequently, no due process rights were violated. Moreover, the District Court held that even if James Leo Sullivan participated in a secret deal whereby three black patrolmen would be promoted at the expense of three white patrolmen "such evidence would not be enough to

3. This evidence was not mentioned by the District Court, however it was discussed by the Court of Appeals (26a).

support plaintiff's allegation that he was a victim of racial discrimination" (13a).

The United States Court of Appeals for the First Circuit affirmed the District Court's granting of summary judgement. However, petitioner's equal protection claim was deemed time barred by the statute of limitations in that petitioner failed to file his §§1983, 1985(3) claims within the short administrative statute of limitations (six-month period) applicable to administrative complaints filed with the Massachusetts Commission Against Discrimination (37a). The Court of Appeals was silent as to the appropriateness of the District Court's summary disposition of petitioner's equal protection claim and applied the six-month statute of limitations retroactively. The Court of Appeals also

affirmed the District Court's grant of summary judgement finding that the petitioner was not deprived of due process of law by the promotion procedures (31a) utilized by the respondent City Manager, although the Court of Appeals conceded that race may have been a dispositive factor in the promotion process and that procedures mandated by state law may have been disregarded (n.5, 26a).

Petitioner filed a petition for rehearing, relying on evidence demonstrating that he did not obtain facts supporting his claim of racial discrimination until May, 1978 and thus, his action was timely. Petitoner's request for rehearing was denied by the Court of Appeals (40a-43a).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Provisions of Title 28 of the United States Code, Sections 1343, 2201, 2202 and Title 42 of the United States Code, Sections 1983 and 1985(3) provide the basis for federal jurisdiction in the above-mentioned court of first instance.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER APPLICATION OF THE MOST APPROPRIATE STATUTE OF LIMITATIONS IN AN ACTION ARISING UNDER 42 U.S.C. §§1983, 1985(3).

Congress has not adopted a statute of limitations for actions arising under 42 U.S.C. §1983. When Congress fails to create a statute of limitations for federal causes of action, courts must apply the statute of limitations of the most analogous causes of action under the law of the state in which the federal cause of action arises. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). The application of state law must be consistent with the policies underlying the federal cause of action.

Occidental Life Insurance Company v. EEOC, 432 U.S. 355, 367 (1977); Runyon v. McCrary, 427 U.S. 160, 180 (1976).

State statute of limitations, however, should not be automatically applied in civil rights actions if it would discriminatorily single out federal causes of action by imposing an unduly brief period in which to commence the action. Chambers v. Omaha Pub. School Dist., 536 F.2d 222 (8th Cir. 1976). Courts need not search for a state statute which would apply only in a remotely analogous manner if a state statute of limitations is found which clearly governs and is directly related to the federal civil rights claim. Chambers, id. at 228; Warren v. Norman Realty Co., 513 F.2d 730, 734 (8th Cir.), cert. denied, 423 U.S. 855 (1975).

Petitioner filed his civil rights action prior to the expiration of the

statute of limitations previously adhered to in District of Massachusetts. Ware v. Colonial Provision Co., Inc., 458 F. Supp. 1193, (D. Mass 1978); Deluca v. Sullivan, 450 F. Supp. 736 (D. Mass 1977); Holden v. Boston Housing Authority, 400 F. Supp. 399 (D. Mass 1975). While the Court below recognized that decisions in the District of Massachusetts have uniformly held that actions arising under the Civil Rights Acts sound in tort and therefore, the Massachusetts general tort statute of limitations applies (3 years, see, M.G.L. c. 260 §2A), it held that a uniform approach to all civil rights cases would not be utilized (34a-35a).

The Court below foreclosed the possibility of petitioner obtaining relief in an action predicated upon an allegation of racial discrimination in public employment, irrespective of petitioner's reasonable

reliance on previous interpretation of the applicable federal and state statutes of limitation. State courts may not foreclose relief for litigants relying on federal statutes. Miles v. Illinois R.R., 315 U.S. 698 (1942). Petitioner is entitled to similar protection.

The Court below held that the most analogous statute of limitations was the six month statute utilized by the Massachusetts Commission Against Discrimination, Mass. Gen. Laws Ann. Ch. 151B §5 (37a). Petitioner asserts that the short administrative statute of limitations is not "most analogous" in a case arising under the Civil Rights Acts. Actions filed with the Massachusetts Commission Against Discrimination are not necessarily predicated upon allegations of state action, unlike actions arising under 42 U.S.C. §1983. Additionally, the structure of M.G.L. Ch. 151B is

designed to foster mediation and conciliation of civil rights actions. Administrative informality is utilized in the gathering of evidence and attempts to resolve the matter in dispute. The administrative statute of limitations is only analogous in that actions claiming racial discrimination by a public employer may be filed under that statute.

Petitioner asserts that utilization of a six month statute of limitations for his civil rights action is inappropriate under federal law. Johnson v. Railway Express Agency, Inc., supra, at 454. Strong federal policy considerations dictate against reliance on a short administrative statute of limitations in cases arising under the Civil Rights Acts.

A survey of decisions in other Circuit Courts of Appeals reveals that no

other court has applied a short administrative statute of limitations in determining the "most analogous" state statute of limitations for an action arising under 42 U.S.C. §1983. Other Circuit Courts have decided with uniformity that limitations periods for the filing of an administrative claim are inapplicable to civil rights actions in courts of law. Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975) (six-month period for filing complaint with Ohio Civil Rights Commission); Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972) (90-day period for filing complaint with Kentucky Civil Rights Commission); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), cert. denied, 400 U.S. 911 (1970) (120-day period for filing complaint of a discrimination claim under Illinois Fair Employment Act);

Green v. Ten Eyck, 572 F.2d 123 (8th Cir. 1978) (180-day period for filing complaint under Missouri Discriminatory Housing Practices Law); Chambers v. Omaha Public School District, supra, at 225-27 (180-day period under Nebraska Fair Employment Act); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977) (30-day period for challenging action by Board of Commissioners of a utility district); Zuniga v. Amfac Foods, Inc., 580 F.2d 380 (10th Cir. 1978) (six-month limitations period for filing civil rights complaints under the Colorado Anti-Discrimination Act).

The Eighth Circuit in the Green case specifically rejected the trial court's assertion that a six-month limitations period was the most analogous state statute of limitations for a plaintiff's claim arising under §1983 since state

action is an essential element of the cause of action, unlike a state administrative action. Green v. Ten Eyck, supra, at 1288.

The Court below, in imposing a six-month limitations period for a civil rights claim under §1983, not only has taken a position in a square and irreconcilable conflict with the view of other circuits, but has done so in a fashion which undermines strong federal policy considerations. The United States has an interest in a time period that is "sufficiently generous...to preserve the remedial spirit of federal civil rights actions". Shouse v. Pierce County, supra, at 1146. Some causes of action have relatively long limitations periods because the law favors the individuals who prosecute them. See Developments, Statute of Limitations, 63 Harv. L. Rev. 1177, 1185-1186 (1950).

Clearly, victims of constitutional torts fall into said category. See, e.g., Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978), quoting Monroe v. Pape, 365 U.S. 167, 194 (1961).

The United States' interest in maintaining "sufficiently generous" time periods is a response to the special needs of plaintiffs who bring their constitutional claims to federal courts. Waters v. Wisconsin Steel Works, supra, at 476. Suits brought in federal courts of law are generally more complex than complaints filed with administrative agencies and present a greater need for assistance of counsel. Smith v. Perkins-Elmer Corp., 373 F. Supp. 930, 936 (D. Conn. 1973). After a charge is filed with the administrative agency, it is the "agency's responsibility to shoulder the

burden and initiative of investigation". Smith v. Perkins-Elmer Corp., id. at 936. In judicial proceedings, the plaintiff must build his own case, a particularly demanding burden in §1983 cases filed in the District of Massachusetts. As the Court declared in Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976), "While we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture". Judicial proceedings require more expansive limitation periods than those utilized in administrative proceedings in order to allow plaintiffs more time for investigation before filing. DeMalherbe v. Intern. Union of Elevator Constructors, 449 F. Supp. 1335, 1347 (N. D. Cal. 1978). Longer statute of limitations periods are particularly

appropr. ate for judicial proceedings so as to foster negotiation between the parties before adversary positions have become inflexible. "[T]he filing of a law suit alters in a very significant way the posture of the parties and their ability to reach an informal settlement". Budreck v. Crocker National Bank, 407 F. Supp. 635, 644 (N.D. Cal. 1976). "Whereas the filing of a lawsuit reflects the failure of negotiation and makes settlement less likely, an administrative proceeding represents, at least in theory, the continuation of negotiation with the help of a professional mediator". DeMalherbe v. Intern. Union of Elevator Constructors, supra, at 1335.

The Court of Appeals' decision to impose a six-month statute of limitations in the case at bar presents an important federal jurisdictional issue that should

be decided by this Honorable Court. Bruner v. United States, 343 U.S. 112 (1952). Additionally, the decision by the Court below presents a square and irreconcilable conflict with relevant decisions from the Sixth, Seventh, Eighth, Ninth and Tenth Circuits for the United States Court of Appeals. See, e.g., Avco Corp. v. Aero Lodge, 75, 390 U.S. 557 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1967). These conflicts justify the grant of certiorari to review the judgement below.

II. A RETROACTIVE APPLICATION OF A SHORT ADMINISTRATIVE STATUTE OF LIMITATIONS PRESENTS A CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THE UNITED STATES SUPREME COURT

Assuming for purposes of argument that it was proper for the Court below to hold that a six-month statute of limitations applies in a case arising under 42 U.S.C. §1983 claiming a denial of equal protection in the form of racial discrimination by a public entity, a retroactive application of said statute of limitations conflicts with decisions of this Honorable Court.

This Court, in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971), specified the factors to be considered in determining whether "nonretroactivity" is appropriate in new decisions altering a

statute of limitations. In order for a decision to be applied nonretroactively, a new principle of law must be created:

> ...either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968), or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, 393 U.S. 544 (1969). Second, it has been stressed that "we must...weigh the merits and the demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation" Linkletter v. Walker, 381 U.S. 618 (1965). Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of the Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity" Cipriano v. City of Houma, 395 U.S. 701 (1969).

The Court of Appeals retroactively applied a short administrative statute of limitations (six months) in lieu of a longer judicial statute of limitations (3 years) to petitioner's civil rights action alleging a denial of equal protection in the form of racial discrimination by a public entity (31a-37a). This retroactive application of the shorter limitation period is in direct conflict with the guidelines established in Chevron Oil Co. v. Huson, supra.

Clearly, the Court below established a new principle of law by overruling past precedent that litigants in the District of Massachusetts have utilized. Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 218 (1st Cir. 1978); Graffals Gonzales v. Garcia Santiago, 550 F.2d 687 (1st Cir. 1977); Ware v. Colonial Provision Co., Inc., 458 F. Supp. 1193

(D. Mass 1978); Deluca v. Sullivan, 450 F. Supp. 736 (D. Mass 1977); Holden v. Boston Housing Authority, 400 F. Supp. 399 (D. Mass 1975). In fact, the Court that heard petitioner's claim held in the related case of Deluca v. Sullivan that the tort statute of limitations applied so that the plaintiffs might "have a reasonable period of time in which to have access to the federal courts" (34a). The Deluca case and petitioner's claim arise from the same series of promotions within the Cambridge Police Department in 1975. The Court of Appeals suggests that whether a general statute of limitations is automatically to be used in civil rights actions is a question of first impression. Assuming the legitimacy of such a claim, it is clear, in light of the uniform approach in determining applicable limitations periods in the

District of Massachusetts, that the resolution of the question could not have been "clearly foreshadowed".

Imposition of a six-month statute of limitations in petitioner's civil rights claim would frustrate the "prior history and purpose of the rule in question". State law must be utilized in order to determine the applicable limitations period in §1983 cases only to the extent that federal policy will be observed. Congressional intent to protect civil rights of individuals will be undermined if a six month statute remains the rule in the First Circuit. "If a Circuit must choose between two state statutes for causes of action, each roughly analogous to a civil rights action, the Court should always choose the longer statute in order to best effectuate that federal policy." DeMalherbe v. Intern.

Union of Elevator Constructors, supra, at 1341. See, Guam Scottish Rite Bodies v. Flores, 486 F.2d 748, 750 (9th Cir. 1973). A retroactive application of the shorter statute of limitations will allow the Court of Appeals to foreclose relief for petitioner who reasonably relied on a federal statute, Miles v. Illinois Central R.R., supra, a result Congress could not have intended with the creation of the Civil Rights Acts.

The severity of the Court of Appeals' retroactive application of the shorter statute of limitations is underscored by the denial of petitioner's timely petition for rehearing on the issues of the statute of limitations and the accrual of his cause of action (39a-42a). Retroactive application of the new statute of limitations was particularly unfair to petitioner since his claim of

racial discrimination did not accrue until May 23, 1978. See Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975). The Court of Appeals' refusal to remand petitioner's action to the District Court to determine the factual issue of accrual illustrates the harsh nature of the Court's decision.

Retroactive application of the six-month statute of limitations produces the extreme "inequitable results" addressed in the Chevron Oil Co. case. As in England v. State Board of Medical Examiners, 375 U.S. 411 (1964), nonretroactive application here simply preserves petitioner's right to his day in court. Chevron Oil Co. v. Huson, supra, at 108. A retroactive application of the short statute of limitations is in direct conflict with decisions of the United States Supreme Court and justifies the

grant of certiorari to review the judgement below.

III. THE DECISION BELOW ERRED AS TO THE STATUS OF STATE LAW HOLDING THAT PETITIONER DOES NOT HAVE A PROPERTY INTEREST IN THE PROMOTION PROCEDURES MANDATED BY CHAPTER 31 §27 OF THE GENERAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS

The Court of Appeals misapplied state law in failing to recognize petitioner's property right in the promotion procedures mandated by Chapter 31 §27 of the General Laws of the Commonwealth of Massachusetts (30a). Petitioner by virtue of his placement on the civil service eligibility list has a property interest in the procedures utilized by the appointing authority, including a

specific statement of reasons upon being by-passed for promotion. The Court below misapplied state law in holding that since petitioner does not have a property right to the ultimate promotion, no other property interests are at stake. The Court below failed to distinguish or deny the basis in state law supporting petitioner's claim that he has a property interest in the promotion procedures (29a-31a). Mass. Gen. Law Ch. 31 §27; McKenna v. White, 287 Mass. 495, 192 N.E. 84 (1934); Jarosz v. City of Chicopee, Massachusetts Superior Court No. 78-1336(1978). See, also, Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973).

Massachusetts Civil Service Law, Ch. 31 §27 requires that the appointing authority, electing to by-pass for promotion an individual whose name appears on the civil service eligibility list,

must provide a specific statement of reasons to the applicant explaining the basis for that decision. The courts of the Commonwealth of Massachusetts, in interpreting §27, have held that the term "best qualified" (statement provided petitioner) is insufficient for the purposes of the statement of reasons required by the statute. Moreover, the Massachusetts courts have recognized that employees have a property interest in the required statement of reasons in order to protect individuals from "unwarranted prejudiced or wrongful personnel decisions," and to impose a restraint on the appointing authority so as to prevent casual, prejudicial, arbitrary or wrongful actions. Jarosz v. City of Chicopee, supra, at 4, citing, McKenna v. White, supra.

The decision below explains that property interests protected by the Fourteenth Amendment include interests secured by "existing rules or understandings" under state law. Perry v. Sinderman, 408 U.S. 593, 601 (1972) (30a). However, the Court of Appeals failed to apply state law faithfully by refusing to acknowledge that the Massachusetts Civil Service statute Ch. 31, §27 grants one a protected property interest in a valid and specific "statement of reasons" upon being passed over for promotion by a person who places lower on the civil service eligibility list. The Court merely characterized petitioner's due process claim as one predicated on a "property interest in promotion to sergeant" (30a). Petitioner has never made such a claim, but rather claims a property interest in the fairness of the

promotion procedures and in a specific statement of reasons upon being skipped over for promotion by persons who placed lower on the civil service eligibility list.

The Court of Appeals' misapplication of state law is an error of law of substantial importance to public employees seeking promotion in the Massachusetts Civil Service system in that promotion procedures and decisions will not be afforded the protection and guidance of the due process clause of the Fourteenth Amendment. Additionally, the lower court's misapplication of state law will frustrate the purpose of Chapter 31 §27 by allowing appointing authorities to make arbitrary, capricious and discriminatory personnel decisions. The lower court's misapplication of state law justifies the grant of certiorari to

review the judgement below.

IV. A DENIAL OF PETITIONER'S DUE PROCESS CLAIM PREDICATED ON A PUBLIC ENTITY'S NONCONFORMANCE WITH STATE MANDATED PROCEDURES DUE TO CONSIDERATIONS OF PETITIONER'S RACE PRESENTS A CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THE UNITED STATES SUPREME COURT

The Court of Appeals held that apart from a determination of petitioner's property interest in the promotion procedures utilized by the respondent, petitioner's due process claim was constitutionally insignificant and subject to summary judgement (29a).

While the Court of Appeals concedes that "the Cambridge Police Department procedures for the 1975 sergeant promotions were irregular" (29a) and that race

may have been utilized as a dispositive factor therein (26a), petitioner's claim was held constitutionally insignificant. The lower courts refused to allow petitioner to present his due process claim to a jury, in spite of the Court's acknowledgement that state law may have been violated on the basis of constitutionally impermissible criteria.

The Court of Appeals' affirmance is in direct conflict with the rule established by the Court in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78(1978). While courts may refrain from acting as super personnel boards in employment disputes that are "incorrect or ill-advised", Bishop v. Wood, 426 U.S. 341 (1976), courts must entertain employment disputes when protected property interests, i.e., protective promotion procedures designed to protect employees

from arbitrary and capricious decisions, are disregarded due to considerations of race and other constitutionally impermissible criteria.

Respondent's failure to provide petitioner with an adequate statement of reasons under state law deprived petitioner of a federally protected property interest. Although petitioner has no statutory entitlement to the promotion itself, he does have a right under the due process clause of the Fourteenth Amendment to be considered for promotion in accordance with statutory procedures, Arnett v. Kennedy, 416 U.S. 134 (1974), free from constitutionally impermissible criteria, Cafeteria & Restaurant Workers, Local 473, AFL-CIO, v. McElroy, 367 U.S. 886 (1961).

The decision below legitimizes the concept that local personnel bodies may disregard state promotion procedures in a constitutionally offensive manner. The decision, in effect, holds that local appointing authorities have nearly unlimited discretion to make employment decisions that are repugnant to the due process clause of the Fourteenth Amendment.

The decision of the Court of Appeals conflicts with decisions of this Court and justifies the grant of certiorari to review the judgement below.

V. SUMMARY DISPOSITION OF PETITIONER'S CIVIL RIGHTS CLAIM WAS INAPPROPRIATE AND PRESENTS A CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THE UNITED STATES SUPREME COURT

Assuming that petitoner is entitled to advance his equal protection and due process claims, the Court of Appeals' affirmance of the District Court's grant of respondent's motion for summary judgement was error as a matter of law and in conflict with decisions of this Court. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). Poller v. Columbia Broadcasting Systems, 368 U.S. 464 (1962).

The District Court denied petitioner the opportunity to have issues of fact resolved at trial, a right to which he is legally and constitutionally entitled.

Peckham v. Ronrico Corp., 171 F.2d 653 (1st Cir. 1948). Although the record is replete with issues of fact, the District Court denied petitioner his Seventh Amendment right to a jury trial in an action for damages arising under 42 U.S.C. §1983. Curtis v. Loether, 415 U.S. 189, 194 (1974); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962).

The Court of Appeals states in footnote 5 of the opinion that the promotion procedures may have conflicted with state law and may have utilized constitutionally impermissible criteria: "Another possible explanation for the promotion list used is that, as alleged by Burns, the promotion of some of the black plaintiffs in Kantor was an unwritten part of the settlement decree" (26a). Consequently, the existence of

such a deal denied petitioner the equal protection of laws guaranteed to him by the Fourteenth Amendment by discriminating against him on the basis of his race. Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Additionally, since the record supports the inference of such a deal, the failure of respondent James Leo Sullivan to provide petitioner with a specific and valid statement of reasons pursuant to M.G.L. Ch. 31 §27 upon being skipped for promotion was predicated upon an arbitrary, capricious and discriminatory personnel decision. Arnett v. Kennedy, supra; Cafeteria & Restaurant Workers v. McElroy, supra; Vitarelli v. Seaton, 359 U.S. 535 (1959).

Trial by affidavit in the instant case was manifest error in light of the

importance of the issues involved and the numerous questions of fact, as partially outlined by the Court of Appeals below (26a). As the Fifth Circuit noted in Porter v. Califano, 592 F.2d 770, 779 (5th Cir. 1979):

> Summary judgement is particularly inappropriate in a case... involving delicate constitutional rights, complex fact situations, disputed testimony and questionable credibilities. This is especially true where...the administrative record largely shaped by the officials themselves contains clearly conflicting evidence.

The Court of Appeals' decision to affirm summary judgement in the instant case conflicts with decisions of the United States Supreme Court and justifies the grant of certiorari to review the judgement below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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July, 1980

APPENDIX.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FRANCIS J. BURNS,
Plaintiff

v.

CIVIL ACTION NO.
78-1532-C

JAMES LEO SULLIVAN, ET AL,
Defendants

ORDER

June 29, 1979

CAFFREY, Ch. J.

In accordance with the memorandum filed this date, it is ORDERED:

The defendants' motion for summary judgement is allowed. Judgement for the defendants.

Andrew A. Caffrey, Ch.J.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FRANCIS J. BURNS,
Plaintiff

v.

CIVIL ACTION NO.
78-1532-C

JAMES LEO SULLIVAN, ET AL,
Defendants

MEMORANDUM

June 29, 1979

CAFFREY, Ch. J.

This action is brought pursuant to 42 U.S.C. §§1983 and 1985(3) for alleged violations of plaintiff's constitutional rights. The matter is now before the court for consideration of defendants' motion to dismiss.

Plaintiff Burns is a police officer employed by the City of Cambridge, Massachusetts. In October 1973 a civil service examination was administered to 110 individuals, including Burns, who

wished to be considered for promotion to the rank of sergeant in the Cambridge Police Department. In April 1974 on the basis of the exam results the Director of Civil Service, Commonwealth of Massachusetts established a list of seventy-three persons eligible for promotion to the rank of Sergeant. The names were listed according to the scores achieved with the name of the man scoring highest in first place. Burns' name appeared ninth on that list.

In July 1974 five black patrolmen filed suit in United States District Court (Kantor v. Sullivan, C.A. No. 74-2662-T) against numerous State and City officials alleging that the hiring and promotional procedures followed by the Cambridge Police Department were racially discriminatory. All parties in that controversy agreed that no individual

whose name appeared on the eligibility list would be promoted to the rank of sergeant until the Kantor suit was resolved.

In June 1975 a consent decree was entered in Kantor v. Sullivan. Under the terms of that decree twenty-eight men were to be selected for promotion to the rank of sergeant.

In accordance with the terms of the consent decree then Chief of Police Pisani requested that the Massachusetts Division of Civil Service provide him with the names of the applicants who were eligible for the twenty-eight positions. He received a list containing the names of the top forty men on the original list and was directed to choose twenty-eight

from among those forty.[1]

On July 3, 1975 Burns was notified that he had not been promoted and that he had been passed in favor of twenty-two men including three black men whose names had appeared below his on the eligibility list.

Under Massachusetts law an appointing authority[2] electing to by-pass an individual for promotion must state its reason for so doing. Mass. Gen. Laws Ch. 31,

1. Nothwithstanding the fact that Chief Pisani was provided with forty names, plaintiff attaches some significance to his allegation that it had been the practice of the appointing authority for twenty-five years to promote patrolmen to the rank of sergeant according to the order in which their names appeared on the eligibility list.

2. In the case at bar the appointing authority consisted of the Chief of Police and the defendant City Manager James L. Sullivan.

§15C.[3] In the case at bar Chief Pisani stated in writing that the twenty-two men who had been selected over Burns for promotion were "better qualified". The twenty-eight names selected had also been approved by City Manager James L. Sullivan before they were submitted to and approved by the Civil Service Personnel Administrator.

Burns alleges that the conclusion of the Chief of Police and City Manager as approved by the personnel administrator that twenty-two others were "better qualified" than he was arbitrary, capricious and unsupported by plaintiff's record as a police officer and that it was not based on fact or any reasonable objective standard of comparison.

3. The provisions of §15C have been substantially duplicated in the present Mass. Gen. Laws ch. 31 §27.

It is plaintiff's contention that he was denied promotion because he belongs to three classes which are defined by invidious criteria

1) White patrolmen in the Cambridge Police Department

2) Active and vocal white members of the Cambridge Patrolmen's Association

3) White patrolmen in the Cambridge Police Department who have been outspoken with regard to administration and management politics of the Cambridge Police Department to people outside of the department

Plaintiff alleges that a conspiracy existed between Chief Pisani,[4] City Manager James L. Sullivan and others to promote three black patrolmen to the rank of sergeant and that to accomplish the purpose of that conspiracy it was necessary to pass over several white patrolmen

4. Chief Pisani died before this action was filed and thus is not a defendant herein.

who had achieved higher scores on the competitive exam. Plaintiff further alleges that in order to determine who among the white patrolmen would not be promoted the City Manager and Chief of Police considered membership in the second two classes set forth above. It is plaintiff's contention herein that he was denied equal protection of the law as guaranteed by the fourteenth amendment in violation of 42 U.S.C. §§1983 and 1985(3) when his race became a dispositive factor in his failure to be promoted. Plaintiff also contends that defendant James L. Sullivan further violated Section 1983 when he acted under color of state law to penalize Burns for exercising his constitutionally guaranteed right of free speech and deprived plaintiff of his promotion and the exercise of free speech without due process of law.

The only allegations against defendant City Councilor Walter J. Sullivan relate to the time period after plaintiff had been skipped for promotion. Burns alleges that Walter J. Sullivan acting individually and in conspiracy with City Manager James L. Sullivan warned plaintiff that public discussion of the matter would jeopardize his chances of promotion to the rank of sergeant before the eligibility list expired. Plaintiff further alleges that the repeated warnings from defendant City Councilor Walter Sullivan had a chilling effect on plaintiff's first amendment rights.

Defendants James L. Sullivan and Walter J. Sullivan move herein to dismiss the complaint. However since affidavits and depositions will be considered in its determination, the court will treat

defendants' motion as a motion for summary judgement.

The court recognizes at the outset that the position of police sergeant is a position of considerable responsibility and thus that the latitude of discretion afforded to those involved in the selection process must necessarily be broad. See, DiPiro v. Taft 584 F.2d 1 (1st Cir. 1978), petition for cert. filed, 47 U.S. L.W. 3436 (U.S. Dec. 15, 1978) (No. 78-967). When the State legislature enacted Mass. Gen. Laws ch. 31 §15C it recognized that some degree of discretion in the appointing authority was necessary to insure that the most suitable applicant would fill the vacancy. It is clear therefore that Chief Pisani and City Manager Sullivan were expected to exercise their discretion in selecting twenty-eight candidates from the top forty names

on the list for promotion to the rank of sergeant.

Where a city or state official's judgement and discretion is involved in an action under Section 1983 the plaintiff must show that each official personally participated in depriving plaintiff of a constitutional right, Maiorana v. McDonald, Nos. 78-1424, 78-1425 (1st Cir. April 18, 1979); Kostka v. Hogg 560 F.2d 37 (1st Cir. 1977) and that the acts of each were purposefully discriminatory Gaffney v. Silk 488 F.2d 1248, 1250 (1st Cir. 1973) or at least knowing and reckless Harrison v. Brooks 446 F.2d 404 (1971).

To succeed at trial on his equal protection claim therefore Burns must show that defendant City Manager James L. Sullivan acted individually or as part of a conspiracy to purposely deny

plaintiff a promotion to the rank of sergeant on the basis of his race or because of the exercise of his constitutionally guaranteed free speech.

Defendant's motion to dismiss is supported by the affidavit of defendant City Manager James L. Sullivan in which the City Manager states under oath that he has never acted or conspired with any person to deny plaintiff a promotion to police sergeant because he was a white man and that he has never conspired and agreed that certain black patrolmen would be promoted.

To counter the affidavit of City Manager Sullivan, plaintiff presents several pages of the deposition of Beryl Cohen, attorney for the black patrolmen in Kantor v. Sullivan. Mr. Cohen's testimony establishes for purposes of this motion that in addition to the

terms of the consent decree in the Kantor case, Mr. Cohen received an oral promise that three of the black patrolmen he represented would be promoted. Mr. Cohen also stated however that he does not recall whether defendant James L. Sullivan was aware of that agreement.

It is the opinion of this court however that even if plaintiff had evidence which established that the City Manager was privy to such an agreement, such evidence would not be enough to support plaintiff's allegation that he was a victim of racial discrimination.

Two of the black patrolmen who were promoted to the rank of sergeant were among the top twenty-eight names on the eligibility list. Therefore even if the appointing authority had simply promoted the men in the top twenty-eight

slots as plaintiff argues had been its practice for twenty-five years, black patrolmen Kantor and Benson[5] would still have been promoted to the rank of sergeant. Additionally, plaintiff cannot argue that the appointing authority went down on the list solely to effectuate the alleged deal with Mr. Cohen since the lowest person on the list to be promoted was number thirty-one, patrolman McDevitt, a white man.[6] It is also pertinent that nineteen of the twenty-two men who bypassed plaintiff were white men. The existence of the alleged deal between Mr. Cohen and the defendant City Manager therefore would not support plaintiff's allegation that the decision not to

5. Patrolmen Kantor and Benson appeared as numbers 20 and 27 respectively on the eligibility list.

6. The third black patrolman to be promoted was Patrolman Halliday who appeared thirtieth on the eligibility list.

promote him was based on a consideration of his race.

Assuming for purposes of this motion however that the agreement to promote three black men was a substantial factor in the decision to skip over the names of three white men whose names were higher on the list, plaintiff argues that he was one of the three chosen to be skipped because in addition to being white he had exercised his constitutionally guaranteed right of free speech as an active member of the union by criticizing the administration and management of the Cambridge Police Department to persons outside the department.

The uncontradicted affidavit of James L. Sullivan, the City Manager states that he has never acted or conspired with any person to deny plaintiff a promotion to the rank of sergeant because he was a

vocal active white member of the Cambridge Patrolmen's Association or because he was critical of the administration and management of the Cambridge Police Department to persons outside the department. Defendant James L. Sullivan further states under oath that he was never present at any union meeting at which plaintiff spoke nor had he ever heard plaintiff make any statement involving the administration or management of the Cambridge Police Department nor had he knowledge of any such critical statements. The City Manager further deposes that he never took any action adverse to plaintiff due either to his police union membership or any statements made by him at union meetings or elsewhere. When deposed plaintiff readily conceded that he has no information that union activity was an important consideration in the selection

process and that at least one other white man active in the union was among the twenty-eight promoted to the rank of sergeant. In addition, plaintiff points to no statement which was critical of the department's management or administration. In fact plaintiff states that he had a good working relationship with Chief Pisani and thought that he was doing an excellent job. It would appear therefore that plaintiff in the face of City Manager Sullivan's affidavit is unable to point to evidence which raises a question of material fact as to the free speech allegations set forth in his complaint.

> While we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture.

Hahn v. Sargent, 523 F.2d 461, 467 (1st

Cir. 1975), cert. denied 425 U.S. 904 (1976), (quoting Manganaro v. Delaval Separator Co., 309 F.2d 398, 393 (1st Cir. 1962). As to plaintiff's equal protection claims against City Manager James L. Sullivan, which relate to events occurring on or before July 5, 1975 therefore, I rule that defendant should be granted summary judgement.

Having in mind that only those individuals who are being deprived of a property or liberty interest are entitled to due process of law Bishop v. Wood 426 U.S. 341 (1976), Board of Regents v. Roth 408 U.S. 564 (1972), the court turns next to plaintiff's claim that the actions of James L. Sullivan deprived him of a promotion to the rank of sergeant and the exercise of his right of free speech without procedural due process.

It is clear that plaintiff had no property interest in the promotion to the rank of sergeant. Plaintiff's interest here is created by state law and the law of Massachusetts confers no property rights on an individual whose name appears on a civil service eligibility list for promotion since, as discussed above, the ultimate selection is left to the discretion of the appointing authority.

Additionally plaintiff argues that he was deprived of a liberty interest without due process when he was penalized for exercising his right to free speech. As had already been seen however, plaintiff's allegations that the selection was based on the exercise of free speech are premised upon his own conjecture and not supported by evidence.

7. Whether or not the requirements of Mass. Gen. Laws ch. 31 §15C were satisfied by the words "better qualified" is a question of state law without federal significance.

It is well settled in this circuit that local government personnel decisions even if clearly erroneous do not achieve constitutional dimensions unless an intentional deprivation of a constitutional right has occurred DiPiro v. Taft, supra. In addition the Supreme Court has ruled that "[t]he due process clause of the fourteenth admendment is not a guarantee against incorrect or ill advised personnel decisions." Bishop v. Wood, supra at 349-50. I rule therefore that as to plaintiff's claim against defendant James L. Sullivan for denial of due process summary judgement should be entered for the defendant.

Plaintiff next argues that he was denied his constitutionally guaranteed right of free speech after July 5, 1975 as a result of the acts of City Councilor Walter J. Sullivan who acted individually

and in conspiracy with City Manager James L. Sullivan. Plaintiff alleges in his complaint that after his name has been passed over he sought the assistance of Walter J. Sullivan and was warned by the City Councilor that any hope of future promotion from the list would be jeopardized by public discussion of the matter and that plaintiff should keep a low profile and not hire an attorney.

The affidavits of Walter J. and James L. Sullivan deny the existence of such a conspiracy and state that no action was taken to prevent plaintiff from dissussing the promotions from the eligibility list. In addition, plaintiff testified at his deposition that he had no knowledge that the warnings from Walter Sullivan were made in bad faith and that despite those warnings he spoke to numerous City officials, participated

vocally in at least one union meeting and hired a lawyer. Plaintiff also testified that oftentimes his reason for not speaking out was a fear that his words would be misinterpreted or taken out of context. In addition the advice which plaintiff was simultaneously receiving from his attorney was similar to that given him by Walter Sullivan.

It is apparent therefore that plaintiff has no evidence that Walter J. Sullivan acted to intentionally deprive him of his constitutional guaranteed rights or that he was so deprived. Defendants Walter J. Sullivan and James L. Sullivan are therefore entitled to summary judgement as to the claims relating to the time period following July 5, 1975.

Andrew A. Caffrey, Ch. J.

United States Court of Appeals
For the First Circuit

No. 79-1424

FRANCIS J. BURNS,

PLAINTIFF-APPELLANT,

v.

JAMES LEO SULLIVAN, ET AL.,

DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

John A. Moos, with whom *Richard L. Zisson* and *Zisson & Veara* were on brief, for appellant.
Kenneth A. Behar, with whom *Edward D. Kalman*, *Barbara J. Sproat* and *Behar & Kalman* were on brief, for appellees.
Francis X. Bellotti, Attorney General, with whom *John F. Hurley*, Assistant Attorney General, was on brief, for Personnel Administrator for the Division of Personnel Administration for the Commonwealth of Massachusetts, appellee.

March 31, 1980

BOWNES, *Circuit Judge*. Plaintiff-appellant, Francis J. Burns, a white policeman employed by the City of Cambridge, Massachusetts, brought suit in June of 1978 against James L. Sullivan, City Manager of Cambridge, Walter J. Sullivan (not related to James L.), a Cambridge city councilor, and Walter Kountze, Personnel Administrator of the

Division of Civil Service of the Commonwealth of Massachusetts.[1] Burns alleged that the defendants had violated his constitutional rights in July of 1975 by promoting over him to the rank of sergeant twenty-two other applicants, including three blacks, whose names appeared below his on the civil service eligibility list for promotion. After considering the pleadings, affidavits from the defendants and depositions from others, the district court granted the motion of the defendants Sullivan for summary judgment.

On appeal, Burns contends the district court erred in granting summary judgment on his claims that he (1) was denied due process by the promotion rating system ratified by James L. Sullivan; (2) was denied equal protection by James L. Sullivan's decision to promote three blacks, among others, over him; and (3) suffered violation of his first amendment rights because of the advice he sought and received from Walter J. Sullivan subsequent to his non-promotion.

We affirm the district court's findings that Burns was not deprived of due process of law by the promotion procedure used by Cambridge and that Walter J. Sullivan did not violate Burns' first amendment rights. We also find that, since the applicable Massachusetts racial discrimination statute of limitations expired long before Burns filed suit, the district court lacked jurisdiction to hear Burns' equal protection claim.

The Facts

In October, 1973, one hundred ten Cambridge policemen seeking promotion to sergeant took a written civil service

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[1] Burns agreed to Kountze's motion to be designated a nominal party pursuant to *DeLuca* v. *Sullivan*, 450 F. Supp. 736, 741 (D. Mass. 1977). Kountze subsequently resigned as Personnel Administrator and was succeeded by David Marchand, who was automatically substituted for Kountze as a defendant. Fed.R.Civ.P. 25(d)(1).

examination to determine eligibility for promotion. In April, 1974, the Director of Civil Service of the Commonwealth promulgated a list of seventy-three persons determined on the basis of the examination results to be eligible for promotion.[2] The list ranked applicants from highest to lowest according to their score on the examination; Burns ranked ninth.

In July, 1974, five black Cambridge policemen filed suit alleging racial discrimination in the hiring and promotional procedures of the Cambridge Police Department. *See Kantor* v. *Sullivan*, C.A. No. 74-2662-T (D.Mass.). A consent decree entered into in June of 1975 to resolve that suit provided that twenty-eight persons on the eligible list would be promoted to sergeant. Shortly thereafter, Cambridge Police Chief Pisani[3] requested the names of eligible applicants from the Massachusetts Department of Civil Service and received the names of the top forty persons on the list, as well as instructions authorizing him to interview the "proposed appointees."[4]

Chief Pisani subsequently conducted brief interviews with the forty remaining applicants, rating each on the basis of attitude and loyalty, judgment, leadership and supervisory abilities, initiative and resourcefulness and technical skills. By combining this oral examination score (on which Burns ranked thirty-seventh) with the scores from the written

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[2] Under Massachusetts civil service law, the Director of Civil Service was the appointing authority for municipal as well as state civil servants. *See* Mass. Gen. Laws Ann. ch. 31, §§ 1 *et seq.* The Division of Civil Service was abolished in 1975 and replaced by a Personnel Administrator for the Commonwealth. *See* 1974 Mass. Acts ch. 835.

[3] Chief Pisani died prior to the initiation of this suit and, accordingly, was not named as a defendant.

[4] A 1974 study of the Cambridge Police Department by the International Association of Chiefs of Police criticized the Department's "abdication" of applicant evaluation to the State Civil Service Commission and recommended that the Department conduct oral interviews as part of the promotion process.

examination (on which Burns ranked ninth), Chief Pisani apparently created a new score by which he ranked the forty applicants.[5] The names of the twenty-eight persons with the highest scores were sent to and approved by City Manager Sullivan. The Personnel Administrator of the Commonwealth approved the appointments in July of 1975. Three persons listed among the top twenty-eight applicants on the original promotion eligibility list, including Burns, were not promoted to sergeant. The twenty-two persons promoted over Burns included three black policemen who were plaintiffs in *Kantor*. One of the black policemen, Herbert E. Halliday, ranked thirtieth on the original eligibility list. Pursuant to Massachusetts law,[6] which requires an explanation under such circumstances, City Manager

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[5] It is not clear what formula, if any, Chief Pisani used to select the final twenty-eight appointees. A formula giving equal weight to the oral and written examinations ranked Burns higher than Terramacco, who was promoted to sergeant. The three other promotees who ranked below the first twenty-eight applicants on the list that gave equal weight to the oral and written examinations were Kantor, Benson and Halliday, three of the black plaintiffs in *Kantor* v. *Sullivan*. *See* Exhibit B-2, *Burns* v. *Sullivan*, C.A. No. 78-1532-C (D. Mass.). One possible explanation for the promotion of these four persons is that Chief Pisani used a formula giving a weight of ten percent to the applicant's potential for future promotion, as recommended by the 1974 report of the International Association of Chiefs of Police (IACP). However, we find no mention of this formula in Chief Pisani's records or in the affidavits of City Manager Sullivan. Moreover, we note that, although Chief Pisani followed the IACP recommendation as to interviews, he chose to conduct the interviews by himself rather than have them performed by a three-person board, as recommended by the IACP. Then, as now, Massachusetts law required oral interviews to be given by a three-person board. *See* Mass. Gen. Laws Ann. ch. 31, § 10 (1973), *now codified at* ch. 31, § 16. Another possible explanation for the promotion list used is that, as alleged by Burns, the promotion of some of the black plaintiffs in *Kantor* was an unwritten part of the *Kantor* settlement decree.

[6] Mass. Gen. Laws Ann. ch. 31, §15(c), *now codified at* Mass. Gen. Laws Ann. ch. 31, § 27.

Sullivan stated that the reason for appointing the twenty-two persons not ranked highest on the original eligibility list was that the appointees were "better qualified." The Personnel Administrator accepted this explanation in making the appointments.

Burns became aware on July 3, 1975, that he had been passed over for promotion. Under Massachusetts law, he had two statutory avenues of appeal from this decision. Massachusetts civil service law provides an automatic right of appeal to the Civil Service Commission for persons unsuccessful in gaining appointment or promotion. Mass. Gen. Laws Ann. ch. 31, § 2(b).[7] *See Goldblatt* v. *Corporation Counsel,* 360 Mass. 660, 662, 277 N.E.2d 273, 277 (1971). This remedy is limited by Civil Service Rule 33, which permits the Civil Service Commission to refuse to hear appeals filed more than thirty days after the Director's decision.[8] Judicial review of the Commission's decision may be sought by writ of certiorari to the Massachusetts Supreme Judicial Court. *Goldblatt* v. *Corporation Counsel, supra.* The second avenue open to Burns was the filing of a complaint of racial discrimination in employment pursuant to the Massachusetts antidiscrimination statute.

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[7] Mass. Gen. Laws Ann. ch. 31, § 2(b) provides in pertinent part:

> In addition to other duties imposed by this chapter and chapter thirteen the commission shall—
>
> (a) Make investigations at its own discretion, or whenever requested in writing by the governor, the council, the general court or either branch thereof, the director, an aggrieved person, or by ten registered voters.
>
> (b) Hear and decide all appeals from any decision or action of, or failure to act by, the director, upon application of a person aggrieved thereby[.]

[8] Mass. Civil Service Rule 33 provides:

> 1. The Commission may decline to entertain any appeal from any decision of the Director not received within thirty days of the date of the giving of notice by the Director to the appellant, or in cases of appeals regulated by statute within any lesser period provided therein.

Mass. Gen. Laws Ann. ch. 151B, § 5.[9] Such a complaint, if filed within six months of the act of discrimination, precipitates an investigation and, if warranted, corrective action by the Massachusetts Commission Against Discrimination (MCAD). Judicial review of the actions of the MCAD is available by appeal to the Superior Court and then to the Supreme Judicial Court. Mass. Gen. Laws Ann. ch. 151B, § 6. *See East Chop Tennis Club* v. *Mass. Comm'n Against Discrimination*, 364 Mass. 444, 305 N.E.2d 507 (1973).

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[9] Mass. Gen. Laws Ann. ch. 151B, § 5 provides in pertinent part:

> Any person claiming to be aggrieved by an alleged unlawful practice . . . may . . . file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of . . . which shall set forth the particulars thereof and contain such other information as may be required by the commission.
>
> . . .
>
> After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful practice complained of . . . . After a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court. . . . Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination.

Burns elected to pursue neither of these alternatives. Instead, he contacted Councilor Sullivan, in part to ask his advice and in part to use him to pressure City Manager Sullivan, who served at the pleasure of the City Council, to promote him to sergeant. Councilor Sullivan advised Burns not to cause a controversy and not to hire a lawyer. Two days later, Burns retained counsel. Burns' attorney also advised Burns not to cause a controversy over his nonpromotion. Burns followed that advice, taking no legal action until the filing of this suit on June 28, 1978, nearly three years after the announcement of the promotion list.[10]

The Due Process Claim

Burns contends it was error for the district court to grant summary judgment on his claim of denial of due process because of the failure of Cambridge City Manager Sullivan and Police Chief Pisani to follow procedures mandated by Massachusetts civil service law. Although we agree that the Cambridge Police Department procedures for the 1975 sergeant promotion were irregular, *see* note 5, *supra,* we find no error in the district court's ruling that these irregularities are not constitutionally significant.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property. *Board of Regents* v. *Roth,* 408 U.S. 564, 569 (1972); *Ventetuolo* v. *Burke,* 596 F.2d 476 (1st Cir. 1979). Burns asserts no deprivation of a liberty interest, but argues that the placing of his name on the original eligibility list for promotion and the historic Cambridge Police Department practice of promoting directly from that list gave rise to a property interest. Despite the fact that the property in-

[10] A case upon which Burns relies heavily, *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), was decided the same day he filed this suit.

terests protected by the Due Process Clause include interests secured by "existing rules or understandings," *Perry* v. *Sindermann,* 408 U.S. 593, 601 (1972), and that some aspects of the Massachusetts civil service system may arguably create property interests, *Lavash* v. *Kountze,* 604 F.2d 163 (1st Cir. 1979) (question of property interest in position on eligibility list left undecided), we do not think Burns possessed a property interest in promotion to sergeant.

Massachusetts civil service law provides that most civil service appointments must be made from an eligibility list established as a result of a competitive examination. Mass. Gen. Laws Ann. ch. 31, § 6. Burns took a written competitive examination for promotion to sergeant, placing ninth. If Chief Pisani and City Manager Sullivan had selected the twenty-eight promotees from that list, Burns may well have enjoyed a protected right to promotion. However, Massachusetts law also permits oral and practical examinations to be given in conjunction with written examinations. Mass. Gen. Laws Ann. ch. 31, § 10 *now codified at* ch. 31, § 16. If, because of the results of any such additional examinations, or the consideration of other factors, such as experience, Mass. Gen. Laws Ann. ch. 31, § 22, the promoting authority decides to promote persons whose rank on the original eligibility list is lower than that of persons who are not promoted, the promoting authority must state the reasons for deviating from the order of the eligibility list. Mass. Gen. Laws Ann. ch. 31, § 15(c), *now codified at* ch. 31, § 27. Chief Pisani and City Manager Sullivan exercised the option provided by Massachusetts civil service law and considered the results of an oral examination and possibly other factors. The Personnel Administrator accepted City Manager Sullivan's statement that the twenty-two persons promoted over Burns and others were "better qualified." Thus, while Burns may

have had certain expectations as a result of his rank on the eligibility list, any such expectations were substantially diminished by the ability under state law of Chief Pisani and City Manager Sullivan to consider subjective factors in addition to the written examination score. In light of the qualified nature of these expectations, we find that Burns' interest in becoming a sergeant did not rise to the level of a property interest entitled to constitutional protection. *See Bishop* v. *Wood*, 426 U.S. 341, 345 & n.8 (1976). Having found that there is no substantive property interest in the promotion there is no need for us to examine further Burns' claim that the procedures actually followed were not such as state law required. *Cf. Slotnick* v. *Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977), *cert. denied*, 494 U.S. 1077 (1978) (that state law requires certain procedures does not give those procedures a federal constitutional dimension).

The Equal Protection Claim

In response to Burns' suit, the defendants Sullivan pleaded specific denials and affirmative defenses, including expiration of the statute of limitations. Fed.R.Civ.P. 8(c). Although the district court did not reach the issue of tolling of the statute of limitations, we do. We agree with the defendants that, under the most analogous state statute, time had run on Burns' claim of denial of equal protection.

The question is the applicable Massachusetts statute of limitations. Since the Civil Rights Acts have no limitations provisions, "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern . . . causes" brought under the Acts. 42 U.S.C. § 1988. This mandated adoption of state law comports with the general federal policy of

recognition and use of a state statute of limitations when the federal statute contains none. *See, e.g., Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390 (1906) (Sherman Anti-trust Act); *Campbell* v. *Haverhill*, 155 U.S. 610 (1895) (patent infringement); *Hayden* v. *Oriental Mills*, 15 F. 605 (1st Cir. 1883) (patent infringement). It is now well established that the federal courts will look to the state statute or remedy "most analogous" to the particular civil rights cause of action to determine the time limitation under the Civil Rights Acts. *Ruynon* v. *McCrary*, 427 U.S. 160, 180 (1976); *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 318 (1st Cir. 1978). Generally, the applicable statute of limitations is that which the state would enforce had an action seeking similar relief been brought in state court. *Swan* v. *Board of Higher Education*, 319 F.2d 56, 59 (2d Cir. 1963) (Marshall, J.). The "most analogous" state law will be applied unless it is "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975). *Cf. Robertson* v. *Wegmann*, 436 U.S. 584 (1978) (Louisiana survivorship statute applied to Section 1983 suit, resulting in abatement of action because of death of plaintiff). *See also Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978) (one year Virginia statute of limitations for federal civil rights actions discriminates unreasonably against federal rights where similar state rights protected by longer statutes of limitations).

Determination of the applicable state statute of limitations requires consideration of four questions: (1) the nature of the federal cause of action, *see Davis* v. *United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978); (2) the analogous state causes of action; (3) the state statutes of limitations for those causes of action; and (4) which of the state statutes of limitations is the most appropriate under federal law, see *Johnson* v. *Railway*

Express Agency, Inc., 421 U.S. at 462 n.7. *See generally Ware* v. *Colonial Provision Co., Inc.*, 458 F. Supp. 1193, 1194-95 (D.Mass. 1978).

Burns premised his suit on 42 U.S.C. §§ 1983 and 1985(3). The district court properly characterized his action as alleging denial of equal protection in the form of racial discrimination by a public entity.

When Burns was passed over for promotion, he had available to him two analogous state causes of action. He had an automatic right of appeal within the state civil service system in which he could have alleged failure to follow state civil service law. Mass. Gen. Laws Ann. ch. 31, § 2(b). This cause of action expired in thirty days. Mass Civil Service Rule 33. The second cause of action was a specific complaint of racial discrimination which had to be filed with the Massachusetts Commission Against Discrimination within six months of his nonpromotion. Mass. Gen. Laws Ann. ch. 151B.

We are aware that three separate district court decisions in the District of Massachusetts have held that actions under the Civil Rights Act sound in tort and, therefore, the Massachusetts general tort statute of limitations should be applied. *Ware* v. *Colonial Provision Co., Inc.*, 458 F. Supp. 1193; *DeLuca* v. *Sullivan*, 450 F. Supp. 736 (D.Mass. 1977); *Holden* v. *Boston Housing Authority*, 400 F. Supp. 399 (D.Mass. 1975). While we often defer to district court interpretations of state law, we find these decisions are not conclusive in this case.

In *Ware* and *Holden*, the question was whether the case was controlled by the six-year statute of limitations for contracts or the two-year tort statute.[11] No other Massachusetts statutes of limitations were considered. *Ware* involved a suit for racial discrimination in hiring and dis-

[11] The general tort statute of limitations was increased to three years by 1973 Mass. Acts ch. 777, § 1.

charge brought against a private employer under 42 U.S.C. § 1981. The more analogous statute of limitation was found to be the one governing tort actions. In *Holden*, no mention was made of the more specific remedy for wrongful discharge of a public employee: a writ of mandamus filed with the Supreme Judicial Court within six months of the discharge. Mass. Gen. Laws Ann. ch. 31, § 46A.[12] Consequently, we think *Ware* and *Holden* must be limited to the statutes of limitations actually considered.

In *DeLuca* v. *Sullivan*, the same court that heard Burns' suit held that the action of other officers passed over in the 1975 Cambridge Police Department sergeant promotion was not barred by expiration of the thirty-day civil service statute of limitations. *DeLuca* v. *Sullivan*, 450 F. Supp. at 738. The court's principal rationale was not that the statute was not the "most analogous," but, rather, that so short a period of time "fails to correspond to the needs of civil rights plaintiffs to have available a reasonable period of time in which to have access to the federal courts." *Id.* The court also relied on what it perceived to be this circuit's rule that the then two-year Massachusetts tort statute of limitations must be applied to civil rights actions.[13] We consider these reasons in reverse order.

Although we have consistently held that civil rights actions brought by dismissed or mistreated employees sound in tort rather than in contract, *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 318 (1st Cir. 1978); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687 (1st Cir. 1977), we have never indicated that a general tort

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[12] This remedy is now codified at Mass. Gen. Laws Ann. ch. 31, § 42.

[13] Mass. Gen. Laws Ann. ch. 260, § 2A now provides:

> Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

statute of limitations is automatically to be used in place of limitations contained in state statutes specifically tailored to deal with the plaintiff's cause of action. *See, e.g., Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d at 318 (Puerto Rico statute regulating political discharge of employees more analogous than general tort statute, but contained no specific statute of limitations). Determination of the "most analogous" state statute requires a careful analysis of state law.

While we see merit in the *DeLuca* court's reasoning that civil rights plaintiffs may need more than thirty days to file a civil rights complaint, we think a six-month limitation reasonable. Although it may take more than six months to properly prepare a civil rights case, a complaint meeting the requirement of Fed.R.Civ.P. 8(a) can surely be filed in that time. And amendments to the complaint and supplemental pleadings may be sought after suit is brought. Fed.R.Civ.P. 15. Moreover, if the plaintiff is required to exhaust his state administrative remedies, a matter of some dispute, *see* note 14 *infra*, his case will have already been prepared and with little, if any, modification can easily be filed within six months of the decision of the state agency.

There are important policy reasons for using the time limitations of a state statute that protects the same rights the plaintiff seeks to vindicate by resort to the federal Civil Righs Acts. Assuming no requirement of exhaustion, a rule providing a three-year statute of limitations will allow state employees to bide their time and use the federal courts, bypassing the state administrative proceedings. Two unfortunate results will follow. First, the general government policy, observed at both the state and federal levels, of prompt resolution of personnel disputes will be thwarted. Second, without any showing that state administrative procedures will not provide the plaintiff with due process and protect against constitutional violations, *see Eisen* v. *East-*

man, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970), the federal courts will become surrogate state personnel departments.[14] *See Bishop* v. *Wood,* 426 U.S. 341, 349-50 (1976); *DiPiro* v. *Taft,* 584 F.2d 1 (1st Cir. 1978), *cert. denied,* 440 U.S. 914 (1979).

Finally, the Massachusetts general tort statute of limitations is clearly intended to be used in conjunction with conventional tort, contract and replevin actions for which there is no specific statute of limitations. While, in certain circumstances, such conventional actions may be the "most analogous" actions to civil rights actions, that is so only when the state has not prohibited by statute the deprivation of the specific civil right at bar. Where, as here, the state has provided a specific remedy, complete with statute of limitations, for racial discrimination in public employment and promotion, actions under the federal Civil Rights Acts alleging racial discrimination by the state must be governed by that statute of limitations. In our view, although this rule shortens considerably the time in which an aggrieved person may bring a Section 1983 action for racial discrimination in public employment, it conflicts with no federal

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[14] Since we decide Burns' claims on other grounds, we address his failure to exhaust state administrative remedies only to the extent necessary to note the unsettled state of the law in this area, *compare Gibson* v. *Berryhill,* 411 U.S. 564, 574-75 (1973), *with Ellis* v. *Dyson,* 421 U.S. 426, 432-33 (1975), and to observe that the same strong reasons for recognizing state limitation of action policies in personnel matters also argue for recognition of the primacy of viable state personnel dispute resolution mechanisms. *See Wishart* v. *McDonald,* 500 F.2d 1110, 1114, n.4 (1st Cir. 1974); *Dunham* v. *Crosby,* 435 F.2d 1177, 1180-81 n.2 (1st Cir. 1970). *See also Eisen* v. *Eastman,* 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970); *Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases.* 41 U. Chi. L. Rev. 537 (1974). We note further that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(c), requires persons alleging racial discrimination in employment in a state that has administrative mechanisms which can provide relief to give that state system at least sixty days to provide such relief before proceeding under Title VII.

policy and enhances the ability of the state to resolve its own personnel problems. The time period is no shorter than the six-month period available to federal and state employees under Title VII of the Civil Rights Act of 1964 for initiation of a complaint of racial discrimination in employment. 42 U.S.C. § 2000e-5(e). *See Brown* v. *General Services Administration,* 425 U.S. 820 (1976). In addition, we note that the entire Massachusetts civil service system is built upon a policy of prompt initiation and resolution of public employee personnel actions. *See, e.g., Report of Special Committee on Civil Service Laws, Rules and Regulations, 1930 House Doc. No. 1001* at 9; *Brooks* v. *Registrar of Motor Vehicles,* 1 Mass. App. Ct. 78, 80, 294 N.E.2d 487, 489 (1973); *see generally* Mass. Gen. Laws Ann. ch. 31, §§ 1 *et seq.* This rule gives a plaintiff six months from either the date of the alleged act of discrimination or final state administrative adjudication of the claim of discrimination to seek relief pursuant to Section 1983. Under this statute of limitations, Burns' equal protection claim expired in January of 1976.

The First Amendment Claim

Burns' final contention on appeal, that the advice he solicited from Councilor Sullivan restrained or chilled his freedom of speech, is without a scintilla of merit. He voluntarily sought Councilor Sullivan's advice and assistance in pressuring the City Manager. Councilor Sullivan made no threat; the advice was solicited, offered and accepted for the purpose of achieving Burns' promotion. *See generally Weiss* v. *Patrick,* 453 F. Supp. 717 (D.R.I.), *aff'd* 588 F.2d 818 (1st Cir. 1978), *cert. denied,* 442 U.S. 929 (1979). While Burns rejected Councilor Sullivan's advice not to hire an attorney, he accepted the advice of both his attorney and Councilor Sullivan not to cause a controversy over

his nonpromotion.[15] Burns strains credulity in contending that he followed Councilor Sullivan's advice and not that of his attorney. Finally, even if Councilor Sullivan alone had advised Burns, we know of no facts alleged in this case that would take Councilor Sullivan's actions outside the public officials' qualified, good faith immunity from Civil Rights Acts damage liability. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 238-49 (1974); *Maiorana* v. *MacDonald*, 596 F.2d 1072 (1st Cir. 1979). In these circumstances, the district court properly granted summary judgment as to the claimed first amendment violation. *Butz* v. *Economou*, 438 U.S. 478, 508 (1978); *Maiorana* v. *MacDonald*, 596 F.2d at 1077.

Affirmed.

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[15] If Burns had not received similar advice from his attorney, Councilor Sullivan's advice still would not have given substance to Burns' first amendment claim, but it might have given Burns some assistance in overcoming the statute of limitations. *See Dunham* v. *Crosby*, 435 F.2d 1177, 1180 (1st Cir. 1970) (school superintendent's active discouragement of use of employee appeal procedure by teacher and personal initiation of extra-statutory procedures held to bar superintendent's reliance on exhaustion.)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 79-1424.

FRANCIS J. BURNS,
Plaintiff, Appellant,

v.

JAMES LEO SULLIVAN, ET AL.,
Defendant, Appellees.

JUDGMENT

Entered March 31, 1980

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

_____

Clerk.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

FRANCIS J. BURNS,
Plaintiff-Appellant,

No. 79-1424

v.

JAMES LEO SULLIVAN, ET AL,
Defendants-Appellees

Before Coffin, Chief Judge,

Campbell and Bownes, Circuit Judges.

ORDER OF COURT

Entered April 25, 1980

Appellant petitions for rehearing on the issue of expiration of the six-month statute of limitations which we found applicable to his claim of racial discrimination. In addition to contending that a six-month statute of limitations contravenes the policies underlying the federal Civil Rights Acts, a matter we decline to reconsider, Burns claims the

six-month period did not begin to run until on or about May 23, 1978, and that his equal protection suit was, therefore, not time-barred. While we doubt that petitioner's failure to raise this claim in response to appellee's arguments on the original hearing is adequately excused, we nevertheless reject it on its merits.

The substance of Burns' petition is an affidavit by Wayne A. Perkins, Esq., an attorney who represented another Cambridge policeman in a connected case in 1978. The affidavit states that Perkins was told by Beryl Cohen, Esq., attorney for the black plaintiffs in Kantor v. Sullivan, that the Kantor suit was dropped in return for a promise that the black plaintiffs would be promoted to the rank of sergeant. Perkins states further that he informed counsel for Burns of Cohen's

statement on or about May 23, 1978. Burns argues that his cause of action did not accrue until he received this information. We disagree. Even assuming, as Burns urges, that the statute of limitations on his claim of racial discrimination did not begin to run until the time he knew or should have known his cause of action had accrued. see Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975), that would be of no help to Burns here. Burns knew on July 3, 1975, that he had been passed over for promotion, and he should have known shortly thereafter that four persons, including the three black plaintiffs in Kantor, had been promoted over him, although ranked below him on every known merit list prepared by the City of Cambridge. See Burns v. Sullivan, slip op. at 4 n.5. This information should have been sufficient to alert Burns that

several persons may have been promoted over him solely because of their race. If Burns had initiated his suit, or at least an investigation, at that time, he might have gained Perkins' information from Attorney Cohen himself. We see no leeway in the law for an aggrieved party to wait an indeterminate period for his cause of action to become more meritorious, due to the discovery of important facts, such as evidence of discriminatory intent.

Petition for rehearing denied.

By the Court:

Clerk.

CONSTITUTION OF THE UNITED STATES

AMENDMENT VII.

Civil trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

1. To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS §1985];
2. To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge

were about to occur and power to prevent;

3. To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

4. To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. §2201

Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 U.S.C. §7428] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgement or decree and shall be reviewable as such.

28 U.S.C. §2202

Further necessary or proper relief based on a declaratory judgement of decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgement.

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985(3)

TITLE 42

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

MASS. GEN. LAWS C.31 §27

Appointment or promotion;
manner of selection

Except as provided otherwise by section fifteen, if the administrator certifies from an eligible list the names of three persons who are eligible for and willing to accept appointment, the appointing authority, pursuant to the civil service law and rules, may appoint only from among such persons. If such eligible list contains the names of less than three persons who are willing to accept appointment, the appointing authority may appoint from among those persons or may request authorization to make a provisional appointment pursuant to sections twelve, thirteen and fourteen.

If an appointing authority makes an original or promotional appointment from

a certification of any person other than the person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the division.

MASS. GEN. LAWS C.151B, §5.

Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A and ninety-eight of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A and ninety-eight and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The

attorney general may, in like manner, make, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A and ninety-eight, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to co-operate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action...Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said

sections ninety-two A and ninety-eight, nor shall the institution of proceedings under said sections ninety-two A and ninety-eight, or a judgement thereunder, be a bar to proceedings under this section.

MASS. GEN. LAWS C. 260 §2A

Three years; actions of tort, contract to recover for personal injuries and replevin

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-97.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

FRANCIS J. BURNS,
PETITIONER,

v.

JAMES LEO SULLIVAN ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the Court of Appeals for the First Circuit, in interpreting Massachusetts law, correctly affirmed the decision of the district court that petitioner had no property interest in becoming a police sergeant which was entitled to constitutional protection.

2. Whether the Court of Appeals for the First Circuit, in interpreting Massachusetts law, correctly ruled that petitioner's racial discrimination claim under 42 U.S.C. §§ 1983, 1985(3) was barred by the six-month statute of limitations set forth in Mass. G.L. c. 151B, § 5.

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In the
Supreme Court of the United States.

OCTOBER TERM 1980.

FRANCIS J. BURNS,
PETITIONER,

v.

JAMES LEO SULLIVAN ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported at 473 F. Supp. 626 (D. Mass. 1979) and is set forth in pages 1a-22a of the Appendix to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the First Circuit is reported at 619 F.2d 99 (1st Cir. 1980) and is set forth in pages 23a-38a of the Appendix to the Petition for a Writ of Certiorari.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on March 31, 1980. By order dated April 25, 1980, the Court of Appeals denied petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant provisions of 42 U.S.C. §§ 1983 and 1985(3); Mass. G.L. c. 31, § 15, ¶ C (now codified at c. 31, § 27); Mass. G.L. c. 151B, § 5; Mass. G.L. c. 260, § 2A, are included in the Appendix to the petition.

The relevant provisions of Mass. G.L. c. 31, §§ 2(b) and 46A (now codified at c. 31, §§ 2[b] and 42, respectively); Mass. G.L. c. 151B, § 4, cl. 1; Mass. G.L. c. 151B, § 9, are included in the Appendix annexed hereto.

Prior Proceedings.

On June 30, 1978, petitioner filed a complaint in the United States District Court for the District of Massachusetts alleging that his failure to be promoted to the position of police sergeant within the City of Cambridge Police Department in July of 1975, deprived him of due process of law, was based upon his race (white) and therefore denied him equal protection of the laws; and was in retaliation for exercising his First Amendment rights. The city manager of the City of Cambridge, the respondent James L. Sullivan, was named as a defendant in

petitioner's complaint. In addition, petitioner's complaint alleged that a city councillor, the respondent Walter J. Sullivan (no relation to the city manager), violated his First Amendment rights because of certain advice sought by petitioner and received from the city councillor.

Respondents' motion to dismiss petitioner's complaint was supported by their affidavits, and by deposition excerpts including deposition testimony of petitioner. Treating respondents' motion as one for summary judgment, the district court rejected petitioner's claims on their merits and entered judgment for respondents. Specifically, the district court ruled that petitioner had no property interest in the sergeant promotional process triggering constitutional safeguards; that petitioner was not denied equal protection of the laws because his race could not have been the basis for his non-promotion since the officer ranked lowest on the civil service eligible list who was promoted to the rank of sergeant was white; that petitioner's claim that he was not promoted because of his exercise of free speech was pure "conjecture and not supported by evidence" (Appendix to petition, p. 19a); and that petitioner had "no evidence" that City Councillor Walter J. Sullivan had acted to deprive him of any First Amendment right (Appendix to petition, p. 22a).

In appealing to the United States Court of Appeals for the First Circuit, petitioner did not challenge the district court's decision rejecting his claim that he was not promoted due to his exercise of First Amendment rights. The Court of Appeals affirmed the district court's decision that Massachusetts law did not confer upon plaintiff any property interest in becoming a sergeant which was entitled to constitutional protection. The Court of Appeals chose not to reach the merits of petitioner's equal protection claim and instead affirmed the district court's judgment on the alternative ground, argued consistently by respondents, that petitioner's racial discrimination

claim was barred by the six-month statute of limitations set forth in Mass. G.L. c. 151B, § 5. Finally, the Court of Appeals ruled that petitioner's First Amendment claims against the respondent city councillor were "without a scintilla of merit." (Appendix to petition, p. 37a.)

In seeking review in this Court, petitioner's constitutional claims have been winnowed to two, namely his due process and equal protection claims.

Statement of the Case.

On October 27, 1973, the Division of Civil Service of the Commonwealth of Massachusetts conducted an examination for promotion to the rank of sergeant within the Cambridge Police Department. In April of 1974, the then director of the Massachusetts Division of Civil Service, established an eligible list for promotion to sergeant consisting of the seventy-three officers who had ranked highest on the examination. Petitioner, a white male, was positioned number 9 on the list.

In July of 1974, five black patrol officers in the Cambridge Police Department, including four on the sergeant eligible list, brought suit in the United States District Court for the District of Massachusetts alleging that Cambridge Police Department promotional policies and practices discriminated against them on the basis of race, citing, among other things, the fact that in the history of the department, only one black patrol officer had been promoted to a supervisory position. *Kantor* v. *Sullivan*, Civ. Action No. 74-2662-T. The *Kantor* suit was resolved by a consent decree which provided for the promotion of twenty-eight police officers to the rank of sergeant. Petitioner, a party to that suit, was represented by counsel and signed the consent decree.

On June 13, 1975, Cambridge Chief of Police, Francis A. Pisani (who became deceased prior to this action and is not a party to this case), requested the Director of Civil Service to certify a sufficient number of names of eligible police officers to fill twenty-eight sergeant vacancies. The director, pursuant to civil service law, furnished Chief Pisani with a certified eligible list containing the names of the forty police officers who had scored highest on the sergeant promotional examination. Instructions accompanying the eligible list authorized Chief Pisani to interview "proposed appointees," and to submit the names of those persons nominated for promotion to the director for approval.

Chief Pisani interviewed the forty police officers whose names appeared on the civil service eligible list, and rated each for attitude and loyalty, judgment, supervisory and leadership, technical skills and initiative/resourcefulness. The utilization of these criteria was recommended by the International Association of Chiefs of Police (IACP) which in the late Fall of 1974 had conducted a study highly critical of the Cambridge Police Department. The IACP report had condemned the department's "abdication" of promotional testing responsibility to the State Civil Service Commission, and had recommended that oral interviews become an important part of the promotional process.

The petitioner's oral interview ranking was 37th out of the 40 eligible officers. This evaluation was consistent with petitioner's being rated 22nd out of 25 by a review board, in April of 1975, which evaluated detective applicants for such qualities as attitude, job knowledge, and job potential.

Following the oral interview process, Chief Pisani submitted to the respondent City Manager, James L. Sullivan, the names of twenty-eight police officers, including three black officers, for promotion to the rank of sergeant. The city manager ratified Chief Pisani's selections for nomination. Chief Pisani

and the city manager then submitted the twenty-eight names to the personnel administrator (succeeding the civil service director) of the Commonwealth[1] for his approval. Twenty-five of the police officers' names submitted for the personnel administrator's approval were not ranked highest on the eligible list. The reasons for nominating for promotion twenty-five police officers who were not placed highest on the eligible list were that these police officers were "better qualified." Petitioner and the officers listed fourth and fifth on the eligible list were not among the twenty-eight officers submitted to the personnel administrator for sergeant promotion approval. In early July of 1975, the personnel administrator, exercising his independent functions and authority under Massachusetts Civil Service Law, approved both the nominations of Chief Pisani which had been ratified by City Manager Sullivan, and the reasons stated for nomination of individuals not listed highest on the eligible list.

A co-counsel for the plaintiffs in *Kantor* v. *Sullivan*, prior to the signing of the consent decree in that case, understood that three of his clients would be promoted, but was unable to identify any person(s) who informed him the three promotions would take place, and acknowledged that his understanding was not based upon first-hand knowledge, but rather was derived from a hearsay source. The attorney in the *Kantor* case did depose, unequivocally, that he had neither an understanding with nor commitment from the respondent city manager or respondent city councillor concerning the promotion of his clients. He further deposed that he had no knowledge, personal or indirect, that the city manager was aware of

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[1] Pursuant to Mass. Stat. 1974, c. 835, the position of director and the Division of Civil Service were abolished and all duties formerly delegated to the director, including the establishment of eligible lists and approval of appointments and promotions to civil service positions, were transferred to a newly created position of personnel administrator for the Commonwealth.

any commitment to nominate his clients for promotion. In this regard, the attorney's sworn testimony was identical to that of the city manager who deposed that he never agreed to nominate black patrolmen for promotion to the rank of sergeant as part of a pre-consent decree commitment in connection with the *Kantor* case.

Petitioner had an absolute right to appeal his failure to be promoted pursuant to State Civil Service Law. Had he pursued such an appeal, petitioner would have been entitled to an adjudicatory type hearing before the Civil Service Commission wherein he could have challenged both his failure to be promoted and the reasons for promoting persons ranked lower than himself on the civil service eligible list. However, petitioner never exercised his right to appeal his failure to be promoted to the position of sergeant.

Argument.

The Petition Presents no Substantial Question Warranting Further Review by this Court.

The decision of the Court of Appeals is clearly correct and presents no reason for further review in this Court. Petitioner's remaining constitutional claims derive no support from the uncontroverted sworn testimony comprising the record in this case and are foreclosed by decisions of this Court. Petitioner's due process claim is frivolous in view of uniform decisional law holding that placement on a Massachusetts civil service eligibility list creates no property interest entitled to constitutional protection. Petitioner's equal protection claim was properly dismissed by the Court of Appeals on statute of limitations grounds. The conflict among circuit court decisions perceived by petitioner on the statute of limitations issue is illusory given

the express and distinct language of pertinent Massachusetts statutes and their construction by the Supreme Judicial Court of Massachusetts. Moreover, the Court of Appeals' analysis of the statute of limitations issue is consistent with this Court's methodological approach most recently set forth in *Board of Regents of the University of the State of New York* v. *Tomanio*, ____ U.S. ____, 100 S. Ct. 1790 (decided May 19, 1980).

PETITIONER'S DUE PROCESS CLAIM.

Any property interest of petitioner which is entitled to due process protection is "created and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). Petitioner possessed no entitlement to promotion triggering due process requirements by virtue of his name appearing on a civil service eligible list, whatever the rank. It has always been the law in Massachusetts that "[a]n appointing authority is free to choose a certified applicant other than the one at the top of the list if a statement of reasons is filed with the director. [Mass.] G.L. c. 31, § 15, par. C."[2] *Milton* v. *Civil Service Commission*, 365 Mass. 368, 374, 312 N.E.2d 188, 193 (1974); *Evans* v. *Town of Watertown*, 417 F. Supp. 908, 912 (D. Mass. 1976); *Carey* v. *Weaver*, Civil Action No. 78-2669-Z (D. Mass. 10/15/79) (unreported decision, slip op. at 2) ("As applicants for patrolmen positions, [plaintiffs] have no . . . interest [protectible under the due process clause]"). *See also*, *Bishop* v. *Wood*, 426 U.S. 341, 345 (1976).

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[2] Massachusetts General Laws c. 31, § 15, ¶ C, is now codified at Mass. G.L. c. 31, § 27. References in this brief to sections of Mass. G.L. c. 31, will be to the sections as they were prior to recodification. Such was the approach adopted by the Court of Appeals.

In his complaint filed in the district court (and in his petition) petitioner has conceded that the "statement [required by Mass. G.L. c. 31, § 15, ¶ C] was filed pursuant to law." Notwithstanding this concession in his complaint, petitioner claims that he was deprived of due process because the words "better qualified" as used by the appointing authority did not constitute a sufficient statement of reasons within the meaning of Mass. G.L. c. 31, § 15, ¶ C, for promoting officers ranked below him on the civil service eligibility list. The district court ruled that "[w]hether or not the requirements of Mass. Gen. Laws ch. 31, §15C were satisfied by the words 'better qualified' is a question of state law without federal significance." 473 F. Supp. at 631, n.7 (Appendix to petition, p. 19a). The Court of Appeals declined to address the sufficiency of reasons for promoting persons not ranked highest on the eligible list having concluded that petitioner lacked any property interest entitled to constitutional protection. 619 F.2d at 104-5 (Appendix to petition, p. 31a).

Petitioner's claimed due process violation presents, as the district court held, a pure state law question. "The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." *Slotnick* v. *Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). Moreover, state law expressly afforded petitioner an absolute right to appeal his failure to be promoted and to challenge the reasons for the appointing authority's selection of the twenty-five police officers whose names did not appear highest on the civil service eligible list. Mass. G.L. c. 31, § 2(b). *Goldblatt* v. *Corporation Counsel*, 360 Mass. 660, 662, 277 N.E.2d 273, 277 (1971); *Reidy* v. *Acting Director of Civil Service*, 354 Mass. 760, 236 N.E.2d 88 (1968). Thus, state law provided petitioner an opportunity for a trial-type adjudicatory hearing, thereby affording him any and every conceivable due process protection

to which he could claim entitlement. Petitioner's failure to pursue the safeguards afforded by state statute does not translate the claims he could have raised in state forums into constitutional questions.[3]

Petitioner claims that the decision of the Court of Appeals conflicts with this Court's decision in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978). Such a contention cannot withstand analysis. In *Horowitz*, this Court rejected the procedural due process claims of a student dismissed from medical school for academic reasons, and without deciding whether the student had a substantive right to be free from an allegedly arbitrary dismissal decision, concluded that her dismissal had not been arbitrary. In assessing what process was due the dismissed student, this Court specifically "warn[ed] against any . . . judicial intrusion into academic decision making." *Id.* at 92.

Rather than support petitioner's position, the measured due process analysis by this Court in *Horowitz* reveals its bankruptcy. In *Horowitz*, this Court was properly reluctant to fashion a substantive right to be free from an allegedly arbitrary decision in an area involving specialized, discretionary, and, in part, subjective evaluations of academic performance. In declining petitioner's invitation to review and resolve the appropriateness of forty promotional decisions, and to assess

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[3] In his brief to the Court of Appeals for the First Circuit, the personnel administrator for the Division of Personnel Administration for the Commonwealth, a nominal defendant in this case, concurred with respondents that petitioner "overstated both the scope of [Mass. G.L. c. 31, § 15, ¶ C] and its significance to the issues before [the] Court." Moreover, to assist the Court of Appeals in evaluating the scope of Mass. G.L. c. 31, § 15, ¶ C, the personnel administrator noted that "[a]t the time when Cambridge submitted its statement of reasons in this case, the Personnel Administrator, consistent with [the] legislative policy of permitting municipalities to exercise discretion in the promotion process, routinely accepted statements of reasons which indicated that the person selected was better qualified."

the relative attributes and qualifications of the candidates, both courts below heeded this Court's warning in *Horowitz* by recognizing the wide discretion possessed by appointing authorities when making promotional decisions, and by following this Court's express directive that federal courts are not to involve themselves in assessing the merits and demerits of personnel decisions made by public agencies. *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976); 619 F.2d at 99 (Appendix to petition, pp. 35a-36a); 473 F. Supp. at 631 (Appendix to petition, p. 20a). Petitioner simply ignores this Court's consistent admonitions that the federal courts are ~~an~~ inappropriate forum to resolve assessments in areas involving such matters as academic performance and personnel qualifications.[4]

Aside from the prudential considerations articulated by this Court, petitioner in this case cannot possess any substantive due process right where, as noted above, he possesses no property interest which would entitle him to procedural due process safeguards. *Cf. Horowitz*, where this Court assumed that the petitioner possessed a property interest. 435 U.S. at 84-5. Moreover, respondents submit that the inappropriateness of fashioning the substantive due process right to be free from an allegedly arbitrary decision claimed to exist by petitioner, is self-evident where as here, petitioner declined to pursue the state statutory procedures whereby he could have tested the alleged arbitrariness of the decision not to promote him.

Petitioner's due process claim does not give rise to a substantial constitutional question let alone a question warranting this Court's further review. Decisions of the Supreme Judicial Court of Massachusetts and of federal courts interpreting Massachusetts law uniformly hold that petitioner did not have a

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[4] Petitioner's claim that his failure to be promoted represented an arbitrary decision is rebutted by the record in this case which reveals that plaintiff was evaluated by four superior officers as lacking in such qualities essential to the supervisory position of sergeant as attitude, judgment, and leadership.

property interest with respect to sergeant promotions which is entitled to constitutional protection. In assessing petitioner's due process claim, both courts below gave proper deference to appointing authority discretion in making promotions, and to this Court's stated concern that federal courts should not sit as super personnel boards to resolve public employment personnel disputes.

Petitioner's Equal Protection Claim.

Petitioner's equal protection claim is premised upon his assertion that he was discriminated against on the basis of race with respect to his failure to be promoted to sergeant. The Court of Appeals determined that petitioner's claim was time barred by the six-month limitation period set forth in Mass. G.L. c. 151B, § 5, the state statute prescribing the cause of action "most analogous" to petitioner's racial discrimination allegation. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1976); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). This issue was never briefed by petitioner in the Court of Appeals (Appendix to petition, p. 41a).

Massachusetts General Laws c. 151B, § 4, cl. 1 makes it an unlawful practice for an employer to discriminate against any individual with respect to the terms, conditions, or privileges of employment because of the individual's race or color. The Massachusetts Supreme Judicial Court has expressly stated "that the clear purpose of [Mass.] G.L. c. 151B is to implement the right to equal treatment guaranteed to all citizens by the *constitutions of the United States* and the Commonwealth. . . ." *Katz* v. *Massachusetts Commission Against Discrimination*, 365 Mass. 357, 366, 312 N.E.2d 182, 187 (1974) (emphasis added). Section 5 of the statute requires that any complaint seeking to redress an unlawful discriminatory practice

"must be . . . filed within six months after the alleged act of discrimination" with the Massachusetts Commission Against Discrimination (MCAD). As a condition precedent to obtaining any judicial consideration of a racial discrimination claim, with respect to public employment, a complainant must present the complaint to the MCAD within the required six months. *East Chop Tennis Club* v. *Massachusetts Commission Against Discrimination*, 364 Mass. 444, 305 N.E.2d 507 (1973). Indeed, a contention or objection by a party to MCAD proceedings that is not first presented to the commission cannot be advanced in court absent extraordinary circumstances. *Katz* v. *Massachusetts Commission Against Discrimination*, 365 Mass. 357, 364, 312 N.E.2d 182, 186 (1974) (construing Mass. G.L. c. 151B, § 6).

The express language of Mass. G.L. c. 151B, and the foregoing judicial precedents establish that under Massachusetts law, petitioner's equal protection claim alleging racial discrimination with respect to public employment, falls squarely within the purview of Mass. G.L. c. 151B, § 4, cl. 1 and would have to be raised by petitioner within the six-month time period specified in § 5 of the statute for the claim to be heard in state court. The Supreme Judicial Court of Massachusetts has expressly affirmed that petitioner's identical claim, namely a claim of racial discrimination with respect to sergeant promotions, is properly pursued under Mass. G.L. c. 151B, § 4, cl. 1. *Springfield Board of Police Commissioners* v. *Massachusetts Commission Against Discrimination*, Mass. Adv. Sh. (1978) 1160, 375 N.E.2d 710.

Petitioner argues that Mass. G.L. c. 151B, is not "most analogous" with respect to his racial discrimination claim because it is not necessary to allege state action under the statute, and the statute provides for conciliation by the MCAD. Petitioner's arguments are misplaced. That Mass. G.L. c. 151B, affords a remedy that is not limited to employment discrimina-

tion by governing authorities, does not mean that the statute does not apply (or should not be applied) to claims of discrimination in public employment.[5] Secondly, the conciliation procedures built into Mass. G.L. c. 151B, do not derogate from the requirement in § 5 of the statute that a complainant must articulate and present his/her racial discrimination claim within six months as a precondition to obtaining judicial consideration of the claim.[6]

Petitioner claims that the six-month limitation period set forth in Mass. G.L. c. 151B, may not be appropriately applied to causes of action alleged to arise under 42 U.S.C. §§ 1983 and 1985. In support of this contention petitioner essentially argues that other courts of appeals in interpreting the laws of other states, have declined to apply statutes of limitations involving administrative tribunals.

In interpreting the laws of other states, courts of appeals have declined to apply limitation periods pertaining to the fil-

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[5] Respondents note that common law torts need not invovle state action. Yet petitioner does not suggest that the tort statute of limitations which he claims to be applicable to his racial discrimination claim, should not apply for that reason.

[6] The Court of Appeals correctly rejected application of Massachusetts' general tort statute of limitations to petitioner's racial discrimination claim. Massachusetts G.L. c. 260, § 2A. That statute, on its face, is applicable to conventional, common law torts. 619 F.2d at 107 (Appendix to petition, p. 36a). Significantly, petitioner fails to identify what, if any, tort his cause of action is most analogous to, and offers no argument whatsoever as to why Massachusetts' tort statute of limitations is "most analogous" to his discrimination claim. These omissions are not surprising in view of the express language of Mass. G.L. c. 151B, § 4, cl. 1, and the well-settled proposition that constitutional claims arising under § 1983 cannot be equated routinely with common law torts for which redress may be sought in a state court. *Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). For a criticism of simplistic contract and tort analogies to civil rights actions in connection with statute of limitations issues, see Note, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. St. L.J. 97, 117-121 (1977) [hereinafter cited as Note, *supra* note 6, at].

ing of complaints with administrative agencies, and have instead chosen to apply other "most analogous" and specific state statutory limitation periods governing actions arising under a federal statute,[7] actions arising under a liability created by statute[8] or by the doing of an official act,[9] or actions for which no specific state limitation period is set forth.[10] For a compilation of cases and the approaches to statute of limitations issues adopted by courts of appeals, see Note, *supra* note 6, at 121-126 nn. 178, 190, 198; *Beard* v. *Robinson*, 563 F.2d 331, 337 n.7 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978).

By contrast, Massachusetts has no statute establishing a limitation period for actions arising under a federal statute specifically, or for actions arising under statutes generally. In addition, no Massachusetts law, in catch-all fashion, prescribes a limitation period for actions for which no limitation period is

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[7] *Zuniga* v. *AMFAC Foods, Inc.*, 580 F.2d 380, 384-5 (10th Cir. 1978) (applying Colorado statute of limitations applicable to "actions under federal statutes"); *Chambers* v. *Omaha Public School District*, 536 F.2d 222, 228 (8th Cir. 1976) (applying Nebraska statute of limitations applicable to "[a]ll actions upon a liability created by a federal statute . . .").

[8] *Garner* v. *Stephens*, 460 F.2d 1144, 1148 (6th Cir. 1972) (applying Kentucky statute of limitations applicable to "[a]n action upon a liability created by statute when no other time is fixed by the statute creating the liability".); *Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520, 521-2 (6th Cir. 1975) (applying Ohio statute of limitations applicable to "an action . . . upon a liability created by statute . . .").

[9] *Green* v. *Ten Eyck*, 572 F.2d 1233, 1239 (8th Cir. 1978) (applying Missouri statute of limitations for actions against a public official "upon a liability incurred by the doing of an act in his official capacity and in virtue of his office . . .").

[10] *Shouse* v. *Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977) (applying Washington statute of limitations applicable to actions "for any other injury to the person or rights of another not hereinafter enumerated . . ."); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 488 (7th Cir. 1970), cert. denied *sub nom.*, *International Harvester Co.* v. *Waters*, 400 U.S. 911 (1970) (applying Illinois statute of limitations governing civil actions for which a limitation not otherwise provided).

set forth. For these reasons, the conflict alleged by petitioner to exist between the decisions of other circuits and the Court of Appeals' decision in this case is non-existent. The Court of Appeals' decision is not in conflict with but is *different* from the decisions in other circuits, which is as it should be given the clear differences between Massachusetts' statutes and those of other jursidictions. As noted below, such differences are *per force* to be expected given this Court's direction that federal courts are to look to the particular law of each state to determine the "most analogous" limitation period to apply. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1976). That courts of appeals may conflict on questions of state law is not itself a reason for granting a writ of certiorari. *See, e.g., Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

The decisions in other circuits do not conflict with the decision of the Court of Appeals not only because of different states' statutory schemes, but also because the reasoning of other circuits' decisions cannot be applied to Massachusetts law. For example, in *Chambers* v. *Omaha Public School District*, 536 F.2d 222, 226 (8th Cir. 1976) a representative case most strongly relied upon by petitioner, the court declined to apply an administrative statute of limitations because the limitation did not relate to the filing of an action in state court: "The 180 day period contained in the Nebraska F.E.P.A. . . . is not a limitation upon the filing of a civil action. . . ." In contrast, as noted above, both the express language of Mass. G.L. c. 151B, and the construction of the statute by the Supreme Judicial Court of Massachusetts, make clear that adherence to the six-month limitation period in Mass. G.L. c. 151B, § 5, is a jurisdictional precondition to pursuing discrimination claims in state court.[11] And in fact where a 180 day adminis-

[11] If a complainant files a complaint with the MCAD within the mandatory six-month requirement, s/he may, within ninety days of the filing, com-

trative limitation period governed the filing of a state court civil action involving racial discrimination in housing, the Court of Appeals for the Eighth Circuit applied the limitation. *Warren* v. *Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975), *cert. denied*, 423 U.S. 855 (1975). *Accord, Green* v. *Ten Eyck*, 572 F.2d 1233, 1237-8 (8th Cir. 1978).[12]

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mence an independent action in state court. "No action under this section shall be filed [in state court] later than two years after the alleged unlawful practice [*e.g.*, of discrimination] occurred." Mass. G.L. c. 151B, § 9. Even if the explicit six-month jurisdictional statute may be properly disregarded and the two-year period in § 9 of the statute applied, petitioner's complaint would still be time barred.

[12] Petitioner's perceived conflict between the decision of the Court of Appeals for the First Circuit and decisions of other courts of appeals assumes that the state laws discussed in the various decisions are fungible. Such an assumption is erroneous. Examples from the jurisdictions which were the subject of the decisions relied upon by petitioner at pp. 20-21 of his petition, illustrate the error. In contrast to Massachusetts law, the filing of a complaint with the Kentucky Commission on Human Rights is not a prerequisite to seeking court redress for perceived racial discrimination since under Ken. Rev. Stat. § 344:450 a person considering himself the subject of a discriminatory act "shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter." Ky. Rev. Stat. chapter 344. Similarly, the State of Washington's pertinent employment discrimination statute, Wash. Rev. Code § 49.60.020, although not considered in *Shouse* v. *Pierce*, 559 F.2d 1142 (9th Cir. 1977), provides that nothing in the act "shall . . . be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights." The stated purpose of Mass. G.L. c. 151B, to secure federal constitutional rights cannot be analogized to Colorado law which provides in part that "[n]othing in parts 3 [Colorado Civil Rights Division — Commission — Procedures] to 8 of this article shall be construed to authorize the commission, the director, or the division to enforce any provision of federal law." Col. Rev. Stat. § 24-34-308 (1979). Similarly, the pertinent Massachusetts statute cannot be meaningfully compared to Missouri law since that state's Commission on Human Rights does not appear to have any authority to vindicate federal constitutional rights in specific cases, but instead is merely authorized "[t]o receive

In summary, the conflict perceived by petitioner to exist between decisions of the courts of appeals is nonexistent. Decisions in other circuits have applied "most analogous" statutes of limitations that have no analogue under Massachusetts law. In this case, the Court of Appeals for the First Circuit applied the limitation period set forth in a statute that by its express terms, and as construed by the Supreme Judicial Court of Massachusetts, governs the bringing of racial discrimination claims, such as that advanced by petitioner, in state court.

It remains to consider whether a six-month limitation period applicable to racial discrimination claims arising in the course of public employment, is "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975), cited in *Board of Regents of the University of the State of New York* v. *Tomanio, supra*, 100 S. Ct. at 1795. Petitioner objects to the six-month requirement with the predictable cavil that it does not permit sufficient time for a plaintiff to file a § 1983 claim.

In assessing the consistency of Massachusetts' six-month limitation period with federal policies underlying § 1983, this Court's decision in *Board of Regents of the University of the State of New York* v. *Tomanio, supra*, provides the appropriate frame of reference for purposes of analysis. In *Tomanio*, this Court held that a state's tolling rule should apply to a § 1983 action, and rejected the proposition that federal courts were free to reject state tolling statutes based upon perceived policies of federalism. In so holding, this Court affirmed its

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and investigate complaints of discrimination and to recommend ways of eliminating any injustice occasioned thereby. . . ." Mo. Ann. Stat. § 213.030(3) (Vernon). In addition, the pertinent Ohio statute, in contrast to Massachusetts law, does not authorize the awarding of compensatory damages. *Ohio Civil Rights Commission* v. *Lysyj*, 38 Ohio St. 2d 217, 222, 67 Ohio Opinions 2d 287, 290, 313 N.E.2d 3, 7 (1974).

oft-stated holdings that the borrowing of a state limitation period embodies reliance on the state's wisdom in setting the limit, and that a goal of national uniformity on statutes of limitations, however appealing based upon perceived notions of federalism, must give way to the specific requirements of each state's laws. 100 S. Ct. at 1795-1797.

The Court of Appeals' conclusion that application of Massachusetts' six-month limitation period to claims of racial discrimination in public employment "conflicts with no federal policy," cannot be seriously challenged. The six-month rule does not discriminate against federal plaintiffs but rather imposes a time requirement uniformly applicable to entry into both federal and state forums. *See generally*, Note, *supra*, note 6, at 133-141. Secondly, as the Court of Appeals noted, Massachusetts' six-month requirement, as a *per se* rule, is reasonable since it is identical to the limitation period governing racial discrimination claims of federal and state employees pursuant to 42 U.S.C. § 2000e-5(e) (Title VII of the Civil Rights Act of 1964). Third, the Court of Appeals correctly observed that Massachusetts' six-month rule did not overly burden a § 1983 plaintiff since the Federal Rules of Civil Procedure liberally afford a plaintiff an opportunity to develop a case notwithstanding that the plaintiff might dimly perceive his/her constitutional claims at the time of initiating suit. *See, e.g.*, Fed.R.Civ.P. 15 (amendment of complaints); Fed.R. Civ.P. 56(f) (affidavit certifying need for further discovery to oppose motion for summary judgment). It is neither unreasonable nor burdensome to require a plaintiff, obligated to "set forth the particulars" of any alleged unlawful act of discrimination within six months under Mass. G.L. c. 151B, § 5, to set forth any such "particulars" within an identical time in a federal forum.

In addition to the foregoing, the Court of Appeals gave recognition to the express intent of the Massachusetts legislature

that personnel disputes arising under the Massachusetts' civil service system be resolved within six months. 619 F.2d at 107 (Appendix to petition, p. 37a). Mass. G.L. c. 31, § 46A (now codified at Mass. G.L. c. 31, § 42) requires that where a civil servant seeks direct judicial review by writ of mandamus of action taken by his immediate appointing authority, s/he must do so within six months of that action. Legislative history reveals the policy considerations underlying the prescribed period to initiate judicial review:

> "The Committee further recommends that a time limitation of six months be set for the bringing of an action for reinstatement in any court by any person who claims that his removal from service is illegal. . . . The Committee feels that a period of six months is all that should be allowed for bringing of such an action, in justice to the taxpayers of any city or town."

Brooks v. *Registrar of Motor Vehicles*, 1 Mass. App. Ct. 78, 80, 294 N.E.2d 487, 488 (1973), quoting from Report of Joint Special Committee on Civil Service Laws, Rules and Regulations, 1930 House Doc. No. 1001, p. 9. Thus, Massachusetts' six-month rule is not only supported by the traditional policies of repose inherent in any statute of limitations, but also is supported by Massachusetts' long-established policy that personnel disputes in public employment be promptly resolved.

The "wisdom" of Massachusetts' six-month rule is unexceptionable. The policies of deterrence and compensation embodied in § 1983 are not affected by Massachusetts' six-month limitation, since plaintiffs can enforce their claims by suing within the six-month period. *See, Tomanio, supra,* 100 S. Ct. at 1797. Indeed, petitioner's failure to specifically identify the policies of deterrence and compensation, underscores that the

real gravamen of his objection to the six-month limitation is that it caused him to lose his case. Such a complaint, as this Court has noted, is without merit. *Robertson* v. *Wegmann*, 436 U.S. 584, 593 (1978).

Petitioner argues for the first time in his petition to this Court that the Court of Appeals' decision on the governing statute of limitations should not be applied retroactively to his complaint, since to do so, petitioner contends, would conflict with this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Even assuming for the sake of argument that petitioner properly may advance this contention for the first time to this Court,[13] his reliance on *Chevron Oil* is misplaced.

As a preliminary matter, it should be emphasized that the prospective-only application of a judicial decision for which petitioner argues is clearly the exception to the general and "traditional view . . . that decisions overruling prior holdings or announcing novel doctrine must be applied to all subsequent cases, even if the later cases involve incidents that took place before the crucial judicial ruling." *Zweibon* v. *Mitchell*,

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[13] Respondents submit that petitioner should have first presented his argument for prospective-only application of the statute of limitations decision to the Court of Appeals, and that his failure to do so precludes consideration of the argument by this Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." [Citations omitted.] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Such abstention is particularly appropriate with respect to an issue such as retroactivity, for which the guidelines set forth by this Court in *Chevron Oil* require the making of policy determinations and equitable judgments which the court announcing the "new" rule is best equipped to make in the first instance. *See United States* v. *Fitzgerald*, 545 F.2d 578, 582 (7th Cir. 1976). This is especially true when the "retroactive" application sought to be avoided is to the case in which the decision was announced. In any event, there can be no conflict, for purposes of this petition, between the Court of Appeals' decision and this Court's holding in *Chevron Oil* where the court of appeals was never presented with, never considered, and never resolved the retroactivity question which *Chevron Oil*'s holding decided.

606 F.2d 1172, 1175 (D.C. Cir. 1979) (quoting, at note 10, from *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting): "'Judicial decisions have had retrospective operation for near a thousand years.'"). Accordingly, in seeking the exceptional protection of nonretrospective application of a decision, petitioner "bears the burden of proving that such limited application is justified. . . . *All three of the factors* listed in *Chevron Oil* must be shown to favor prospective-only application before a decision will be denied retroactive effect." *Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278, 1288-1289 (7th Cir. 1980) (citations omitted) (emphasis added).

Most significantly, petitioner has failed to show the existence in this case of the fundamental consideration underlying this Court's analysis in *Chevron Oil*, namely that the Court of Appeals' decision established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Chevron Oil Co.* v. *Huson*, *supra* at 106. On the contrary, the Court of Appeals did not establish a "new principle of law;" rather, it merely applied the "now well established" principle that the federal courts will apply to a § 1983 action the statute of limitations "which the state would enforce" in its own courts in an action "'most analogous' to the particular civil rights cause of action. . . ." 619 F.2d at 105 (Appendix to petition, p. 32a.)

More specifically, the Court of Appeals did not overrule clear past precedent governing the limitation of petitioner's action. Rather, the Court found the district court decisions upon which petitioner purports to have relied[14] to be incon-

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[14] *Ware* v. *Colonial Provision Co., Inc.*, 458 F.Supp. 1193 (D. Mass. 1978); *Deluca* v. *Sullivan*, 450 F.Supp. 736 (D. Mass. 1977); *Holden* v.

clusive and best limited to the statutes of limitations actually considered by those courts. 619 F.2d at 106 (Appendix to petition, pp. 33a-34a.) Moreover, the Court of Appeals pointed out that this circuit has "*never indicated* that a general tort statute of limitations is automatically to be used in place of limitations contained in state statutes specifically tailored to deal with the plaintiff's cause of action." 619 F.2d at 106 (Appendix to petition, pp. 34a-35a) (emphasis added.) Indeed, the Court of Appeals noted in one public employee discharge case that the "most analogous" cause of action under Puerto Rican law was one for political discharge of employees. *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 318 (1st Cir. 1978). Faced with a choice between tort and contract statutes of limitations in a recent § 1981 case, the Court of Appeals expressly declined to choose one over the other, where the plaintiff's claim would be barred under either statute and "[a]ny decision by us as to which Massachusetts statute should be incorporated into § 1981 would be premature and mere dicta." *Daughtry* v. *King's Department Stores, Inc.*, 608 F.2d 906, 910 (1st Cir. 1979). It is clear both from the Court of Appeals' own discussion of the cases in the decision from which petitioner seeks relief, and from an examination of the First Circuit and district court cases themselves, that there was no "clear past precedent" at all upon which petitioner could have justifiably relied or which the Court of Appeals could have overruled in its choice of a statute of limitations in this case. These considerations belie petitioner's characterization of the Court of Appeals' decision as one of first impression, since, as noted above at pp. 12-13, the express terms

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Boston Housing Authority, 400 F.Supp. 399 (D. Mass. 1975). In fact, before filing this petition, petitioner had never purported to rely on any cases other than *Holden*, which was the only statute of limitations case from any court within the First Circuit cited by petitioner in briefing the issue to the district court.

of Mass. G.L. c. 151B, § 4, cl. 1, in effect since 1946, "clearly foreshadowed" application of Massachusetts' six-month limitation period to petitioner's racial discrimination claim.

Although petitioner's inability to demonstrate the existence of even the first *Chevron Oil* factor in the Court of Appeals' decision in this case is sufficient to defeat his plea for nonretroactivity, it is noteworthy that both the second and the third factors are missing as well. The second guideline established by *Chevron Oil* requires consideration of "'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" *Chevron Oil Co.* v. *Huson*, *supra* at 107. Applying this standard it is clear, as discussed above, that the Court of Appeals' decision promotes both the policy of repose generally served by statutes of limitations as well as Massachusetts' stated interest in achieving prompt resolution of public employee personnel actions.

In contrast, the effect of the traditional retroactivity rule on petitioner is to bar only one aggrieved employee's belated litigation of his failure to be promoted over five years ago. This can hardly be the "substantial inequitable results" contemplated by this Court in *Chevron Oil* to constitute a third factor justifying prospective-only application of a decision. Petitioner's loss is a far cry from the hardships which would have affected large and diverse groups of people in *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) (cities, bondholders, and others connected with municipal utilities), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (all persons affected by elections under challenged voting laws), and which tilted the balance of equities in favor of prospective limitation in those cases. Although the Court in *Chevron Oil* did find preclusions of an individual plaintiff's claim to be inequitable, the Court there was faced with very different circumstances, both with regard to the rule announced by the judicial decision in ques-

tion and with respect to the plaintiff himself. In petitioner's case, the Court of Appeals merely applied a familiar principle of federal civil rights law by referring to a well-known and long-standing analogous state anti-discrimination remedy and limitation period. Moreover, the equities especially disfavor petitioner's position, where he forewent two separate remedies available to him under state law, a Civil Service Commission appeal under Mass. G.L. c. 31, § 2(b) and the remedies provided by the anti-discrimination statute, Mass. G.L. c. 151B, and chose to devote his time and energy to obtaining his promotion through the use of political influence, 619 F.2d at 108 (Appendix to petition, pp. 37a-38a).

Petitioner's argument for nonretroactive application of the Court of Appeals' statute of limitations decision fails to satisfy any of the guidelines established in *Chevron Oil*. There is no conflict between the Court of Appeals' decision and this Court's holding in *Chevron Oil*, especially where petitioner failed to give the Court of Appeals an opportunity to consider the issue. Petitioner's nonretroactivity argument is without merit and does not warrant the granting of his petition.

While the Court of Appeals did not reach the merits of petitioner's racial discrimination claim, respondents briefly comment upon that issue since in respondents' view, such comments may be of assistance to this Court in determining whether to grant petitioner's writ.[15]

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[15] Petitioner claims that the Court of Appeals improperly granted summary judgment for respondents as to his equal protection claim. The appropriateness of granting a motion to dismiss and/or for summary judgment on statute of limitations grounds cannot be questioned seriously. Fed.R.Civ.P. 8(c); Fed.R.Civ.P. 12(b)(6). Petitioner's insistence that there existed disputed questions of material fact is nothing more than his dissatisfaction with the record before the district court which included his own deposition testimony. That court appropriately reached the merits of petitioner's racial discrimination claim (as well as his other constitutional claims) in accordance with decisions of the Court of Appeals and of this Court. *Maiorana* v. *MacDonald*,

In the district court, petitioner argued that the appointing authority determined not to promote a sufficient number of whites to make possible the promotion of three blacks to the position of sergeant. Under his theory, petitioner claimed that he was the last white not promoted to insure the promotion of a black. The district court properly rejected this contention on the basis of undisputed mathematics in holding that "plaintiff cannot argue that the appointing authority went down the list solely to effectuate the alleged deal . . . since the lowest person on the list to be promoted was number thirty-one . . . a white man." 473 F.Supp. at 630 (Appendix to petition, p. 14a.)

Secondly, the sworn testimony comprising the record in the district court established that neither respondent took any personal action to cause a deprivation of any right, constitutional or otherwise, which petitioner might have possessed. The respondent city manager did not make the promotion decisions giving rise to this case but instead ratified the nominees for promotion chosen by the then Chief of Police who is not a party to this action. In these circumstances, petitioner's racial discrimination claim is precluded by the well-settled line of decisions holding that liability under § 1983 does not attach unless a named defendant took personal action, recklessly or in bad faith, which *caused* a plaintiff to be deprived of a constitutional right. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Spomer* v. *Littleton*, 414 U.S. 514 (1974); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Naughton* v. *Bevilacqua*, 605 F.2d 586 (1st Cir. 1979).

Thus, the inappropriateness of granting petitioner's writ is underscored both by the lack of merit to his statute of limita-

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596 F.2d 1072, 1077 (1st Cir. 1979); *Hahn* v. *Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied* 425 U.S. 904 (1976); *Butz* v. *Economou*, 438 U.S. 478, 508 (1978) (plaintiff "may not play dog in the manger" when faced with a motion for summary judgment).

tions argument and by the express decisional law of this Court which demonstrates the ultimate insubstantiality of his racial discrimination claim.

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix.

Massachusetts General Laws, Chapter 31.

§ 2. Certain Duties of Commission.

. . . . . .

(*b*) Hear and decide all appeals from any decision or action of, or failure to act by, the director, upon application of a person aggrieved thereby; provided, that no decision or action of the director shall be reversed or modified or action be taken, in case of failure of the director to act, except by three affirmative votes of the commission, and in each case the specific reasons therefor shall be stated in the records of the proceedings of the commission. Hearings on any appeal may be held before less than a majority of the commission or the chairman may assign a member or members to hold such hearings and to report his or her findings of fact and recommendations to the commission for action. An appeal from a decision determining the results of an examination shall be in writing in the form approved by the commission, and shall contain a brief statement of the facts upon which such appeal is based; provided, that no decision of the director relating to an examination mark shall be reversed and no such mark changed unless the commission finds that it was through error, fraud, mistake or in bad faith, and in each case of reversal of such decision or change in marking the specific reasons therefor shall be stated in the records of the proceedings of the commission. In the grading of the subject of training and experience in any competitive examination, no credit shall be allowed, either in the original marking of the examination, upon review of the original marking by the director, or by the commission, whether upon an appeal from the decision of the director or otherwise,

for employment or experience in the position for which the examination is held, unless such employment or experience in the position was the result of an appointment or promotion after certification from an eligible list for the position.

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MASSACHUSETTS GENERAL LAWS, CHAPTER 31.

§ 46A. Petition for Writ of Mandamus for Reinstatement of Certain Persons; Complaints May Be Filed with Civil Service Commission.

The supreme judicial court shall have jurisdiction of any petition for a writ of mandamus for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose office or position is alleged to have been illegally abolished under this chapter; provided, that such petition shall be filed in said court within six months next following such allegedly illegal discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, unless said court for cause shown extends the time.

If any person alleges that his employment or compensation has been affected by action of the appointing authority in failing to follow the requirements of section forty-three, he may file a complaint with the civil service commission within seven days, exclusive of Saturdays, Sundays and holidays, after the said action has been taken. Said complaint shall set forth just how the appointing authority has failed to follow the requirements of section forty-three. This complaint may be filed with the request of the said person for a hearing under the pro-

visions of said section forty-three and if it is determined by the civil service commission that the said authority has failed to follow the requirements of section forty-three and that the rights of said person have been prejudiced thereby, the said commission may order the said appointing authority to restore immediately said person to his employment without loss of compensation or other rights.

MASSACHUSETTS GENERAL LAWS, CHAPTER 151B.

§ 4. Unlawful practices.

It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, age, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

. . . . . .

MASSACHUSETTS GENERAL LAWS, CHAPTER 151B.

§ 9. Construction of statute; inconsistent laws; repeals; exclusiveness of statutory procedure; civil remedies; speedy trial; attorney's fees and costs; limitation.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply, but nothing contained in this chapter shall be deemed to repeal

any provision of chapter one hundred and forty-nine which establishes standards, terms or conditions of employment which are applicable to females, section ninety-eight of chapter two hundred and seventy-two or any other law of this commonwealth relating to discrimination because of race, color, religious creed, national origin, or ancestry, and nothing contained in this chapter shall be deemed to repeal sections twenty-four A to twenty-four J, inclusive, of chapter one hundred and forty-nine or any other law of the commonwealth relating to discrimination because of age; but, as to acts declared unlawful by section four, the procedure provided in this chapter shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall notify the commission of the filing of the action, and any complaint before the commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the commission. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such county at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursuant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust. The commission shall, upon the filing of any complaint with it, notify the aggrieved person of his rights under this section. No action under this section shall be filed later than two years after the alleged unlawful practice occurred.